EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss T Hurynovich	v	1. Leo Scheiner 3. Oscar Scheiner 4. 08344730 Limited (in voluntary liquidation) 5. Fyrtorr Limited

Heard at: Watford Employment Tribunal

On: 11-14 and 17 and 18 January 2022

Before: Employment Judge George
Members: Mr A Scott
Mr S Bury

Appearances
For the Claimant: In person
For the Respondent: Mr M Hodson, counsel
Interpreters in the Russian language: Day 1: Ms T Squires
Day 2: Ms A Leice
Day 3 and 4: Mr Pavlo Kvach
Day 5: Mrs Moore
Day 6: Ms Leice

RESERVED JUDGMENT

1. The name of the fourth respondent is changed to 08344730 Limited (in voluntary liquidation).

2. The claimant’s employment did not transfer to the fifth respondent.

3. All claims against the fifth respondent are dismissed.

4. The claims of race discrimination are dismissed on withdrawal.

5. The claims of sex discrimination are dismissed.

6. The claims of disability discrimination are dismissed.

7. For the avoidance of doubt, all claims against the first and third respondents are dismissed.

8. The claimant was not unfairly dismissed.

9. The fourth respondent shall pay to the claimant £3,769.51, calculated net of tax and national insurance contributions in respect of an underpayment of notice pay.

10. The fourth respondent shall pay to the claimant holiday pay accrued but not taken on termination of employment in the sum of £4,230.41 calculated net of tax and national insurance contributions.

11. As a consequence of paragraphs 9 & 10 above, the conditions of s.38(2)(a) Employment Act 2002 are satisfied. At the time the proceedings were begun, R4 was in breach of its duty to provide the claimant with a written statement of employment particulars.

12. All other claims are dismissed.

REASONS

1. In this hearing, which took place over six days, the documentary evidence was comprised of an agreed bundle of documents running to 1835 pages which contained documents set out in the index. Page numbers in these reasons refer to that bundle.

2. We heard oral evidence from the claimant who adopted a witness statement in evidence. Additionally, we heard from the following witnesses: Mr Leo Scheiner (the first respondent – hereafter R1); Mr Oscar Scheiner (the third respondent – hereafter R3); and Mr Jason Scheiner, the Director of the fifth respondent (hereafter R5). The fourth respondent (hereafter R4) is in creditors voluntary liquidation.

3. All of the witness adopted in evidence written statements upon which they were cross examined. Mr Hodson had prepared an opening note with a chronology and cast list. The chronology and cast list were not agreed but the claimant was content for us to read them on the basis that they were respondent's documents. Mr Hodson then used that note as the basis of his oral submissions. The claimant provided us with some written submissions and expanded on those orally after Mr Hodson's oral submissions.

4. The parties were not able to agree a timetable and we made a decision on the timetable for reasons which we gave at the time and do not now repeat. That provided that the respondent should have a day and a half for cross examination of the claimant, that she should then have two days for cross examination of the

respondent's witnesses and that they should have jointly half a day for submissions, leaving day 6 for deliberation of the tribunal.

5. The claimant has a diagnosed condition of chronic fatigue syndrome with concurrent anxiety and depression (see page 1314 dated 7 January 2021). This diagnosis was made after the period relevant for the allegations of disability discrimination. However, it seemed to us to be relevant to the way in which we should proceed and any adjustments that needed to be made in respect of the process of the hearing. We detail the adjustments made in the following paragraphs.

6. The claimant had requested that an interpreter in the Russian language be available and a tribunal appointed interpreter was provided. However, she has very good English and confirmed that she needed to have an interpreter present only so that she could ask him or her to interpret some words that she did not understand and in case, in the more formal setting of a tribunal, she needed to have things clarified. In fact, she needed to rely on the interpreter only very occasionally. However, there was certain topics of cross examination which caused the claimant to become distressed. We needed to take occasional additional breaks for that reason. Occasionally, the claimant needed to take time to compose herself. None of this is any reflection on the claimant but explains why it was the case that it was not possible to keep to the timetable that we had set.

7. Additionally, the claimant gave extremely full answers, sometimes diverting into topics which were not necessitated by the question. Furthermore, on day 2 of the hearing, the first day of cross examination, the claimant started to complain of a migraine headache and wore a compress for some of the afternoon but, eventually, the afternoon session on day 2 had to be curtailed because the claimant was not able to proceed.

8. Therefore, in the event, the claimant's cross examination was extended over two days and her cross examination of the respondent's witnesses was extended over two and a half days. The consequence was that the tribunal, which needed to take a full day for reading in advance due to the length of the witness statements, were obliged to reserve their judgment.

9. Somewhat unusually, it is not possible in a brief summary outlining the case to state an agreed position as to the identity of the claimant's employer or the length of her employment. It the respondents' case that she was employed by R4, now in voluntary liquidation. The claimant agrees that she was employed by R4 but also argues that she was, since 9 September 2003, employed by the Scheiner family. It was not entirely clear whether she sought to argue that the family was a legal entity in its own right (which cannot be right as a matter of law), or whether she argued that she was employed by a number of different entities run by members of the Scheiner family at one and the same time. At times she appeared to argue that she did work for individuals and companies that were owned and run at various times by members of the Scheiner family and that it

should be inferred that her employment transferred from one employer to another. Clearly such a transfer can only have occurred in accordance with employment law.

10. The first respondent, Leo, (R1) is the father of the third respondent, Oscar (R3) and his brother Jason. Leo Scheiner told us, and it did not seem to be controversial, that he had been an entrepreneur all of his life. Certainly, by 2012, he was the Director of a company called Afterthought Limited. The claimant was paid via PAYE in respect of work done for Afterthought and it was argued on behalf of the respondents that the claimant had been employed by Afterthought and that that employment had ceased at the end of July 2014 before a new employment in a new role started with the fourth respondent on 1 August 2014.

11. The employment with R4 ended on 28 or 29 November 2018 when a letter notifying the claimant that she was being made redundant because the R4 was in voluntary liquidation was seen by the claimant. There is some dispute between the parties as to exactly on what date this was sent but there is no real argument that the claimant did not see it until 29 November 2018. In those circumstances it is on that date that employment by R4 came to an end. R4 has since changed its name to 08344730 Ltd.

12. By the time of her dismissal, by R4, the claimant was employed as the Chief Finance and Chief Operations Officer or, as she calls it, Chief Finance Officer and Chief Operations Officer.

13. Her claim against Fyrtorr Ltd, (R5), arises because Jason Scheiner (hereafter referred to as JS), who was formally an employee engaged in work of an operational nature for R4, is a director of R5. The claimant alleges that there was a relevant transfer of an undertaking from R4 to R5 and that her own employment contract should be regarded as having transferred to R5. We ought also at the outset to mention a further company called Ben Ong UK Limited, which is also in voluntary liquidation. The respondent's case is that this company was formed to carry out the work selling products within the UK market and that all employees of the business other than the claimant were employed by Ben Ong UK Limited.

14. In these reasons we refer to;

    - Ben Ong Limited as R4
    - to Ben Ong UK Limited as UK,
    - to Fyrtorr Limited as R5,
    - to an overseas company called Ben Ong Corporation as Corporation and
    - to Afterthought Limited as Afterthought.

15. The claimant presented a claim on 22 March 2019 following a period of conciliation between 5 February 2019 and 5 March 2019. The claim was originally taken to include complaints of sex discrimination, unfair dismissal,

disability discrimination, race discrimination, protected disclosure detriment, breach of contract or unauthorised deduction from wages, failure to pay annual leave on termination of employment, redundancy payment, and pregnancy and maternity discrimination.

16. Employment Judge Alliott conducted a preliminary hearing on 20 January 2020. After hearing argument, he decided to strike out the pregnancy and maternity claim on the basis that it was based upon events which took place more than three months before the presentation of the claim and there was no reasonable prospect of a Tribunal extending time. The claimant confirmed on 11 January 2022 that she was withdrawing the race discrimination claim.

17. In addition, on 20 January 2020, Judge Alliott made a deposit order in respect of the protected disclosure claims. The deposit was paid on 14 February 2020. However, on 6 July 2020, the claimant decided to withdraw those, and they were dismissed on withdrawal by a judgment sent to the parties on 8 October 2020. However, so far as we are aware, the deposit had not been refunded to the claimant. The parties are to write to the Tribunal within 14 days of the date on which this judgment is sent to them to explain any reason why that deposit should not now be refunded to the claimant.

18. It appears that a dismissal judgment in respect of the pregnancy and maternity claims was issued by the tribunal and sent to the parties on 8 October 2020 (page 190). The race discrimination claims are dismissed on withdrawal by this judgment.

19. The respondents, with the exception of the fourth, defended the claim by an ET3 presented on 15 May 2019. The fourth respondent did not put in a response and it has been directed by Employment Judge Quill that they should only play such part in the hearing as the tribunal may direct. In fact, they have indicated that they do not intend to play any role in the litigation.

Issues

20. As to the issues which fall to us to decide, those can be found in the case management order by Judge Alliott that was dated 20 January 2020 and was sent to the parties on 1 February 2020, save that claims which have since been withdrawn do not need to be considered and are, consequently, omitted from this list.

> *"Time limits/limitation issues*
>
> 4.1 Were all of the claimant's complaints presented within the time limits set out in the Equality Act 2010 ("EQA") and/or the Employment Rights Act 1996 ("ERA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures. Whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "*just and equitable*" basis.

The claimant's employer

4.2 Who was (were) the claimant's employer(s)?

TUPE Transfer

4.3 Whoever was the claimant's employer in 2018, was there at any relevant time a transfer of the claimant's contract of employment to the 5th respondent?

Unfair dismissal

4.4 What was the principal reason for dismissal and was it a potentially fair one in accordance with s.98(1) and (2) of the Employment Rights Act 1996? It is the 1st, 3rd and 5th respondent's case that the claimant was at all material times employed by the 4th respondent and they presume but do not know that the claimant was dismissed by the 4th respondent on the grounds of redundancy due to the 4th respondent's liquidation.

4.5 If so, was the dismissal fair or unfair in accordance with the ERA s.98(4) and in particular did the employer, whoever it was, in all respects act within the so-called band of reasonable responses.

4.6 It may be that issues relating to Polkey, contribution and compliance with the ACAS Code arise.

Disability

4.7 Was the claimant a disabled person in accordance with the Equality Act 2010 at all relevant times because of the following conditions: anxiety, mental health issues and/or PTSD.

Equality Act s.13 Direct Discrimination because of […] sex

4.8 Has the respondent subjected the claimant to the following treatment:

4.8.1 Disregarding her sickness as genuine in March 2018?

4.8.2 Failing to pay her full pay during her sickness absence as opposed to limiting it to statutory sick pay?

4.8.3 Not transferring the claimant from her employer to the employment of the 5th respondent?

4.8.4 Dismissing the claimant?

4.9 Was that treatment less favourable treatment, ie did any of the respondents treat the claimant as alleged less favourably than it treated or would have treated others (comparators) in not materially different circumstances?

4.9.1 The claimant relies on the following comparators: namely a male employee […] in the same circumstances as the claimant and/or hypothetical comparators.

4.9.2 If so, was this because of the claimant's sex […]?

Equality Act s.15 Discrimination arising from disability

4.10 Did the following things arise in consequence of the claimant's disability?

4.10.1 The claimant going off sick in March 2018.

4.11 Did any of the respondents treat the claimant unfavourably as follows:

4.11.1 Disregarding her sickness as genuine in March 2018?

4.11.2 Failing to pay her full pay during her sickness absence as opposed to limiting it to statutory sick pay?

4.11.3 Not transferring the claimant from her employer to the employment of the 5th respondent?

4.11.4 Dismissing the claimant?

4.12 Did any of the respondents treat the claimant unfavourably in any of those ways and/or dismiss the claimant because of that sickness absence?

4.13 If so, has any relevant respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

4.14 Alternatively, have any of the respondents shown that it did not know and could not reasonably have been expected to know that the claimant had the disability?

…..

Unauthorised deductions/breach of contract

4.20 Did any relevant respondent make unauthorised deductions from the claimant's wages in accordance with the Employment Rights Act s.13 by not paying her her full pay in January, February and March 2018 and if so how much was deducted?

4.21 Is the claimant entitled to notice pay, a payment in respect of accrued holiday not taken at the date of dismissal or any other payments?

……

Remedy

6. If the claimant succeeds in whole or in part the tribunal will be concerned with issues of remedy and in particular if the claimant is awarded compensation and/or damages will decide how much should be awarded."

The law

Employment under a Contract of Employment

21. Section 230 of the Employment Rights Act 1996 sets out definitions of "employee" and "contract of employment" for the purposes of the Act. The concepts are defined with relation to each other. Contract of employment means, "a contract of service or apprenticeship, whether express or implied, and (if it is express), whether oral or in writing".

22. Engagement under a contract of employment provides the gateway to, amongst other things, the right to claim unfair dismissal, the right to receive written particulars of employment and the right to receive the statutory minimum notice of termination of employment (under s.85 ERA). Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (read with s.3 of the Employment Tribunals Act 1996) the employment tribunal has jurisdiction to hear a claim for damages for breach of a contract of employment that is outstanding on termination of employment. In the present case, it is accepted that the claimant was, at the time of her dismissal, employed by R4 under a contract of employment. However, she alleges that she has been employed continuously since 2003 and should be regarded as having had 15 years' continuous employment by R4 at the time of her dismissal. We need to consider how many years' continuous employment she had as at November 2018 and that requires us to consider whether she was employed by any other legal person before she was employed by R4 and whether that employment should be regarded as continuous with employment by R4 or as having transferred to R4.

23. No one test is sufficient to determine whether there was a contract of employment. In Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance 1968 1 All ER 433 three questions were posed:

    - did the worker agree to provide his/her own work and skill in return for remuneration?

    - did the worker agree expressly or impliedly to be subject to a sufficient degree of control for relationship to be one of master and servant?

    - Were the other provisions of the contract consistent with its being a contract of services?

24. Different elements of the test are more or less informative in different cases. In Hall (Inspector of Taxes) v Lorimer [1994] 1WLR 209 CA the Court of Appeal advised that the object of the exercise is to paint a picture from the accumulation of detail then stand back and make informed, considered, qualitative appreciation of the whole. It is necessary for us to consider whether the necessary elements of employment and hallmarks of employment are present, in particular mutuality of obligation and sufficiency control as well as whether there are any elements of the agreement which are incompatible with it being a contract of employment.

25. In White v Troutbeck SA EAT/0177/12 the EAT discussed what is meant by sufficiency of control. The important question is whether the agreement between the parties reserves to the putative employer a right of control to a sufficient degree, not merely whether the worker had day to day control over their own work or whether the worker exercises their own judgment about how their work is to be done.

26. It is therefore necessary for us to determine what was agreed between the parties in relation to, amongst other things, the claimant's duties, the hours that she worked, the pay that she received and the method of payment, the responsibility for tax and national insurance contributions (although that is not of itself determinative of the status of the claimant) powers of delegation or substitution on the part of the claimant to another person, the level of control exercised over the claimant and whether she had paid holidays and paid periods of sickness absence.

Transfer of Undertakings (Protection of Employment) Regulations 2006

27. By reg.3(1), the Transfer of Undertakings (Protection of Employment) Regulations 2006 (hereafter TUPE) apply to,

    "(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

    (b) a service provision change, that is a situation in which—

    (i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

    (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

    (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

    and in which the conditions set out in paragraph (3) are satisfied."

28. An "economic entity" is an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. In Cheesman and ors v R Brewer Contracts Ltd [2001] IRLR 144

EAT the EAT set out guidelines for tribunals when determining the question of whether there is an 'economic entity' in existence which included:

a. there needs to be a *stable economic entity*, which is an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity that pursues a specific objective;

b. in order to be such an undertaking, it must be *sufficiently structured and autonomous* but will not necessarily have significant tangible or intangible assets;

c. an organised grouping of wage-earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity; and

d. *an activity is not of itself an entity*; the identity of an entity emerges from other factors, such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it.

29. The conditions of a service provision change include that, immediately before the service provision change, there is an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned and, by reg.3(2A), the activities have to be fundamentally the same as those carried out by the person who has ceased to carry them out.

30. Where there is a relevant transfer, the effect of reg.4 TUPE is that it does not terminate the contract of employment of anyone employed by the transferor and assigned to the organised grouping of resources of employees that is subject to the relevant transfer.

31. In the present case, R5 relies upon the provisions of reg.8 TUPE which provides as follows:

"(1) If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) apply.

(2) In this regulation *"relevant employee"* means an employee of the transferor—

(a) whose contract of employment transfers to the transferee by virtue of the operation of these Regulations; or

(b) whose employment with the transferor is terminated before the time of the relevant transfer in the circumstances described in regulation 7(1).

(3) The relevant statutory scheme specified in paragraph (4)(b) (including that sub-paragraph as applied by paragraph 5 of Schedule 1) shall apply in the case of a relevant employee irrespective of the fact that the qualifying requirement that the employee's employment has been terminated is not met and for those purposes the date of the transfer shall be treated as the date of the termination and the transferor shall be treated as the employer.

(4) In this regulation the "relevant statutory schemes" are—

(a) Chapter VI of Part XI of the 1996 Act;

(b) Part XII of the 1996 Act.

(5) Regulation 4 shall not operate to transfer liability for the sums payable to the relevant employee under the relevant statutory schemes.

(6) In this regulation *"relevant insolvency proceedings"* means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.

(7) Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."

32. It appears that reg.8(7) applies to a creditors voluntary liquidation. R4 was placed in a CVL on 28 November 2018. A consequence of reg.8(7) is that if an insolvency practitioner runs the business and retains its goodwill in order to make it viable for sale the TUPE regulations may apply to any eventual transfer. However, where an insolvent business has been broken up and the assets sold off, TUPE does not take effect because there the insolvency proceedings have been instituted with a view to the liquidation of the assets.

Unfair dismissal

33. The claimant has the right not to be unfairly dismissed: s.94 ERA. It is for the employer to prove that the reason for dismissal was one of the potentially fair reasons set out in s. 98(1) of the Employment Rights Act 1996 (hereafter the ERA) which include redundancy. An employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to a broad range of situations set out in s.139(1) of the ERA.

> "For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish."

34. In Safeway Stores plc v Burrell [1997] ICR 523 the EAT set out a three stage test based upon the statutory formulation:

    34.1 Was the employee dismissed?
    34.2 If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
    34.3 If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

35. In this case the fact of dismissal is admitted. The issues for the tribunal require us to determine whether one or more of the s.139(1) situations had arisen and secondly whether the claimant's dismissal was wholly or mainly attributable to it. She alleges that it was, at least in part, on grounds of sex and/or disability.

36. If the redundancy situation exists, the employment tribunal has limited scope to investigate the business decision to make the claimant redundant. The employer does not have to show an economic justification for the decision to make redundancies. However, that is qualified by the tribunal's jurisdiction to determine whether the redundancy situation is in fact the reason for the claimant's dismissal and whether it was fair within the meaning of s.98(4) of the ERA.

37. If the respondent proves that the dismissal was because of the potentially fair reason, then the tribunal must go on to consider whether the decision to dismiss

was fair or unfair in all the circumstances. This can involve consideration of matters such as whether the respondent used objectively fair and justifiable selection criteria? Did they give sufficient warning aengage in meaningful consultation? Were alternatives to redundancy actively considered?

38. In Polkey v A E Dayton Services Ltd [1988] ICR 142, the House of Lords explained that a failure to follow correct procedures is likely to make the resulting dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been "utterly useless" or "futile". Normally an employer contemplating redundancy dismissals will not act reasonably unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes reasonable steps to avoid or minimise redundancy by redeployment. However, the employment tribunal should go on to consider whether compensation should be reduced to take account of the likelihood that a fair dismissal would have happened in any event.

Wrongful dismissal/Notice pay claims

39. The employment tribunal has jurisdiction under article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (hereafter the Extension of Jurisdiction Order) to hear a contractual claim by an employee where the claim arises or is outstanding on termination of employment and relates to:
    39.1 a claim for damages for breach of the employment contract or other contract connected with employment;

    39.2 a claim for a sum due under the contract.

40. If an employer dismisses an employee without giving the minimum statutory notice (or such longer period of contractual notice that they may have) then that employee has been dismissed in breach of the terms of the contract or wrongfully dismissed. The claim for damages for breach of the employment contract which would result can be claimed under the above article. An Employment Tribunal may not hear claims under art.3 which are presented more than 3 months after the effective date of termination unless it was not reasonably practicable to do so, and the claim was presented within a reasonable further period.

Equality Act claims

The meaning of disability

41. A person has a disability, for the purposes of the Equality Act 2010 (or hereafter the EQA), if they have a mental or physical impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Substantial in this context means more than trivial: s.212(1) EQA and Goodwin v The Patent Office [1991] I.R.L.R. 540. There is no sliding scale, the

effect is either classified as "trivial" or "insubstantial" or not and if it is not trivial then it is substantial: Aderemi v London and South Eastern Railway Ltd [2013] ICR 591 EAT. As it says in paragraph B1 of the Guidance on the definition of disability (2011), this requirement reflects the general understanding that disability is a limitation going beyond the normal differences which exist among people.

42. When considering whether the adverse effects on the claimant's ability to carry out day-to-day activities are substantial the following factors are taken into account (see the Guidance Section B),

42.1 The time taken to carry out an activity,

42.2 The way in which an activity is carried out,

42.3 The cumulative effects of impairments,

42.4 How far a person can reasonably be expected to modify his or her behaviour by the use of a coping or avoidance strategy to prevent or reduce the effects of the impairment,

42.5 The effects of treatment

42.6 There may be indirect effects, such as that carrying out certain day-to-day activities causes pain or fatigue (See Guidance on definition of disability (2011) paragraph D22).

43. In the Court of Appeal's decision in All Answers Ltd v W [2021] EWCA Civ 606, their summary of the relevant law is at paras 24 to 26:

> "24. A person has a disability within the meaning of section 6 of the 2010 Act if he or she (1) has a physical or mental impairment which has (2) a substantial and (3) long term adverse effect on that person's ability to carry out day to day activities….
>
> 25. Paragraph 2(1)(b) of Schedule 1 to the 2010 Act defines long term, so far as material to this case, as "likely to last at least 12 months". "Likely" in this context means "could well happen": see Boyle v SCA Packaging Ltd. [2009] UKHL 37, [2009] ICR 1056,...
>
> 26. The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College:

see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".

44. The EQA provides that, where an impairment is being treated, then it is to be regarded as having a substantial adverse effect if, but for the treatment, it is likely to have that effect (Sch 1 para 5(2)). However, where the effect of continuing medical treatment is to create a permanent improvement rather than a temporary improvement it is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect (See 2011 Guidance at B16 and C11). And C5 and following.

45. When considering the effect of a mental impairment such as depression the most frequently cited case is J v DLA Piper [2005] I.R.L.R. 608 EAT. Paragraphs 40 & 42 of the judgment of Underhill LJ states,

"40: Accordingly in our view the correct approach is as follows:

(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.

(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

…

42: The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at paragraph 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or - if the jargon may be forgiven - 'adverse life events'. We dare say that the value or validity of that

> distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – […] - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraph 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a commonsense observation that such reactions are not normally long-lived."

46. This passage was applied in Herry v Dudley MBC [2017] ICR 610 EAT paras 55 & 56 where HH Judge David Richardson commented that,

> "experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievance, or a refusal to compromise (if there are similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction, but in the end the question whether there is mental impairment is one for the employment tribunal to assess."

Direct discrimination

47. The claimant alleges that she was the victim of a number of acts of sex discrimination contrary to s.13 EQA which prohibits direct discrimination. Direct discrimination contrary to s.13, for the present purposes, is where, by dismissing their employee (A) or subjecting her to any other detriment, the employer treats A less favourably than they treat, or would treat, a male employee (B) in materially identical circumstances and does so because of A's sex or the concept of sex more broadly.

48. All claims under the EQA (including direct discrimination and discrimination for a reason arising in consequence of discrimination) are subject to the statutory

burden of proof as set out in s.136. This has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

49. When deciding whether or not the claimant has been the victim of direct discrimination, the employment tribunal must consider whether she has satisfied us, on the balance of probabilities, that the incidents occurred as alleged and of facts from which we could decide, in the absence of any other explanation, that they amounted to less favourable treatment than a male comparator did or would have received and that the reason for the treatment was that of sex. If we are so satisfied, we must find that discrimination has occurred unless the relevant respondent proves that the reason for their action was not that of disability.

50. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by disability we must have a sound evidential basis for that inference.

51. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of disability. The burden of proof provisions may be of assistance, if there are considerations of subconscious discrimination but the Tribunal needs to take care that findings of subconscious discrimination are evidence based.

52. Furthermore, although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

53. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because

of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of sex, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

Discrimination arising from disability

54. Section 15 EQA provides as follows:

> **"15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

55. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness. Another might be a requirement that an employee take annual leave to attend medical appointments for a disabling condition; they need regular absences for medical treatment in consequence of their disability and they are required to take annual leave to do that. It should not be forgotten that the treatment must be unfavourable nor that the defence of justification is available in claims of s.15 discrimination.

> "In considering whether the example of the disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."

EHRC Employment Code paragraph 5.6.

56. The importance of breaking down the different elements of this cause of action was emphasised by Mrs Justice Simler in Pnaiser v NHS England [2016] I.R.L.R. 160 EAT at paragraph 31,

> "the proper approach can be summarised as follows:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant […].

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) […].

(h) Moreover, the statutory language of s.15(2) makes clear […] that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. […]

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

57. The Court of Appeal considered s.15 EQA in City of York Council v Grosset [2018] ICR 1492 CA and held as follows:

57.1 On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability?

57.2 The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something".

57.3 The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something".

57.4 Section 15(1)(a) does not require that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability.

57.5 The test of justification is an objective one, according to which the employment tribunal must make its own assessment: see *Hardy & Hansons plc v Lax [2005] ICR 1565* , paras 31–32, and *Chief Constable of West Yorkshire Police v Homer [2012] ICR 704* , paras 20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed. What is required is an objective balance between the discriminatory effect

of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove.

58. The other potential defence is lack of knowledge of disability. This requires the respondents to show that they did not know and could not reasonably have been expected to know that the claimant was disabled (constructive knowledge is discussed in the case of Gallop v Newport City Council [2013] EWCA Civ 1583 CA)

Right to a written statement of key terms

59. By section 1 of the ERA, an employer is obliged to provide to a worker or employee a written statement within one month of them starting employment. This written statement must contain the particulars set out in ss.1(3) and (4) ERA. If, after that statement has been provided, there is a change to any of the particulars which are required to be included in that statement then, by s.4 ERA, the employer is obliged to provide a written statement to the worker or employee containing particulars of the change at the earliest opportunity and, in any event, not later than one month after the change in question.

60. These rights are enforced through s.38 of the Employment Act 2002 which provides,

> "38 Failure to give statement of employment particulars etc.
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5. *[As an aside, by para.1 of Schedule 5 these include art.3 of the Extension of Jurisdiction Order, s.23 of the ERA, reg.30 of the Working Time Regulations 1998 and s.120 of the Equality Act 2010.*]
>
> (2) If in the case of proceedings to which this section applies—
>
> (a) the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and
>
> (b) when the proceedings were begun the employer was in breach of his duty to the [worker] under section 1(1) or 4(1) of the Employment Rights Act 1996 (duty to give a written statement of initial employment particulars or of particulars of change) …,
>
> the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.
>
> (3) If in the case of proceedings to which this section applies—
>
> (a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 …,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

…."

61. It can be seen that the jurisdiction to make an award under s.38 of the Employment Act 2002 only arises if the employer is in breach of the obligation to provide a s.1 or s.4 ERA statement at the time when the proceedings were begun and if the employee is successful in relevant proceedings.

62. The right not to suffer unauthorised deductions is also provided for in the ERA as follows,

"13.— Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision" , in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or

combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

…

14.— Excepted deductions.

(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

…

23.— Complaints to [employment tribunals].

(1) A worker may present a complaint to an [employment tribunal] —

(a) that his employer has made a deduction from his wages in contravention of section 13

…

(2) Subject to subsection (4), an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received."

63. The statutory right to paid annual leave and additional annual leave is found in regs.13 and 13A of the Working Time Regulations 1998 (hereafter referred to as the WTR). Regulation 14 of the WTR provides for the situation where an employer's employment ends at a time when they have accrued more paid annual and additional annual leave than they have taken. Reg.30 WTR sets out the procedure by which these rights are to be enforced in the Employment Tribunal.

> "13.— Entitlement to annual leave
>
> (1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.
>
> (3) A worker's leave year, for the purposes of this regulation, begins–
>
> (a) on such date during the calendar year as may be provided for in a relevant agreement; or
>
> (b) where there are no provisions of a relevant agreement which apply–
>
> (i) if the worker's employment began on or before 1st October 1998, on that
>
> date and each subsequent anniversary of that date; or
>
> (ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.
>
> …
>
> (5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under [paragraph (1)]4 equal to the proportion of that leave year remaining on the date on which his employment begins.
>
> (9) Leave to which a worker is entitled under this regulation may be taken in instalments, but–
>
> (a) [subject to the exception in paragraphs (10) and (11),]1 it may only be taken in the leave year in respect of which it is due, and
>
> (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.
>
> 13A.— Entitlement to additional annual leave
>
> (1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—…

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker's employment is terminated; or

(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or

(c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

14.— Compensation related to entitlement to leave

(1) [Paragraphs (1) to (4) of this regulation apply where–]

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be–

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula–

$(A \times B) - C$

where–

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

Findings of fact

64. We make our findings of fact on the balance of probabilities taking into account all of the evidence both documentary and oral which was admitted at the hearing. We do not set out in this judgment all of the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard, based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where those exist.

<u>Who was the claimant's employer and what were the dates of employment under a contract of employment?</u>

64.1 We start by recording that this issue is potentially relevant to the unfair dismissal and wrongful dismissal claims against R4. It is common ground that the claimant was an employee of R4 within the meaning of s.83(2) of the Equality Act 2010 at the time period relevant for her discrimination claims. In this section we set out both our findings of fact and conclusions on this issue.

64.2 It is also common ground that the claimant started to do some work for R1 personally in about 2003 (R1 paras 8 and 9). R1 says her status at that time was that of freelancer and was self-employed; the claimant alleges that she was an employee.

64.3 The tribunal's decision making on this issue has been impeded by a lack of relevant documentary evidence.

64.4 R1 gave oral evidence that the claimant controlled her own hours which would, if accepted, be consisted with her being a freelancer. The claimant pointed to the financial statements for Afterthought for the year to the 31 May 2004, in particular to note 4 on page 788, where it is stated that in both that year and the previous year the average number of persons employed including Directors was one. She argued that that the only staff member was her and that R1 would have known that when he signed the financial statements so this should be taken as acceptance by him that she was the single employee.

64.5 However, we also noticed that in those financial statements at page 786, it is stated that there are no administrative expenses of Afterthought. R1's evidence in his paragraph 9 was that there were no other employees in the business than himself in 2003. It is common ground that the claimant was paid for her work, so it seems to us that that is not reflected as an expense in the financial statements. We therefore conclude that this note should not be interpreted as meaning that the claimant was an employee of Afterthought in those financial years.

64.6 The claimant also took us to selected copies of her bank statements and alleged that a payment on 9 October 2003 of £1,000 was the first payment to her in respect of her employment. That figure is of the amount which the claimant states was the gross payment agreed to be payable for the claimant's work. This would point to the claimant being responsible for her own tax and National Insurance contributions and for them to have agreed that would also be consistent with her being a freelancer and inconsistent with her being employed under a contract of employment. R1 said that he could not remember what he had agreed to pay her at the outset.

64.7 Those two pieces of documentary evidence seemed to us to be more consistent with R1's case that the claimant was a freelancer than with the claimant's case that she was employed under a contract of employment in the initial period. We consider that the claimant has been selective about the bank statements that she has produced. She may not have available copies of all bank statements from the whole period, but we do not see why they could not have been obtained albeit at a cost.

64.8 There are email exchanges between R1 and the claimant dating from 8 April 2008 at 243. The context appears to be that the claimant had had a

baby and her mother had been staying with her to give her support. Her mother is permanently resident in Belarus and the email is sent at a time when her mother's return to Belarus is contemplated.

64.9 It appears from the email that the claimant had been working from home despite it not being ideal for R1. He communicates to the claimant a decision to "consider your contract with YANC terminated as of 20th of this month." YANC is the trading name of R4. It was also a trading name used by Afterthought. It stands for Young Again Nutrients Corporation.

64.10 This email indicates that R1 and the claimant regarded her as having a contract. It does not assist with whether the contract was with Afterthought or with R1 personally but it does support R1's case that he was very flexible with the claimant about the number of hours she was doing and where she would work which again is consistent with being a freelancer.

64.11 We have concluded that the claimant was not an employee at this point. We do not think there is evidence of sufficient control and accept R1's evidence to the effect that they had a flexible arrangement where the claimant was paid a certain amount each month, was responsible for her own tax but carried out whatever duties were necessary to support the business, setting her own agenda and her own hours. It is apparent that the claimant proposed that she would work from home full time after her return from maternity leave and the email at page 243 suggests that R1 regarded it as necessary for the business to have someone working in the office.

64.12 At page 1537 there is an invoice from the claimant dated September 2010 to YANC for £600 in respect of a freelance consultant's contract. And on 1538 there is a transfer request form signed by R1 directing a payment from a bank in Austria in £600 from YANC. The address for that entity on page 1537 is plainly outside the UK.

64.13 Although page 1538 appears to bear Mr Scheiner's signature his oral evidence was that the claimant was arranging all of the transfers and had full access to all of the businesses bank accounts. He said that he just could not remember at what point that happened.

64.14 R1's statement evidence at paragraph 14 was that about one week after the end of the contract the claimant asked to return to work for him and a new arrangement was negotiated for her to work Monday to Wednesday and Friday from the office but not to work on Thursdays. However, on his evidence, the claimant chose to work from home and not during particular set hours.

64.15 There is documentary evidence that she returned to Belarus because of a family emergency and continued to work from there in October 2008 (page

247). It is apparent that she was working hours that fitted around her childcare responsibilities. The email includes the statement:

> "We've never discussed that I should work during specific time during the day (which will be difficult at the moment for me) so I hope it was not a problem."

64.16 Again, this lack of control over the times at which the claimant was working is more consistent with her being a freelancer or consultant than with her being an employee.

64.17 More formal documentation appears from the financial year ending 5th April 2013. A P60 for that year shows that the claimant was paid £2,700 by Afterthought. The following year a P60 for Afterthought shows the claimant was paid £8,100 in the year ending 5 April 2014 (page 1553). A P60 for the four-month period April to July 2014 shows that she was paid £2,700 by Afterthought. She was moved to become an employee of R4 as from 1 August 2014 which is why the P60 from Afterthought for the financial year to April 2014 only covers a four-month period.

64.18 These three P60s suggest that the claimant was put on the payroll of Afterthought in January 2013. R4 was incorporated on 2 January 2013. The claimant's employment by Afterthought ended on 31st July 2014 (the P45 at page 2792). This is supported by an exchange of emails between the claimant and the company accountant at pages 254 to 255.

64.19 It seems to us that Afterthought started regarding her as being an employee when she went PAYE. There is no direct evidence from either the claimant or the first respondent about particular conversations which took place. We infer that from the practice which indicates that Afterthought started to treat the claimant as employed for the purposes of tax from 1 January 2013.

64.20 The claimant's instruction to the accountant at page 255 indicates that she was being moved to become an employee of R4 as from 1 August 2014. These emails are also consistent with it being the claimant who was the individual communicating important instructions with the accountant rather than R1.

64.21 There is no evidence from any of the witnesses from whom we have heard that there was a change of the way in which business was done as between Afterthought and R4. So far as we have been told, the business of selling healthcare products carried out by Afterthought prior to 31 July 2014 was the same as the business carried out by R4 after 31 July 2014. Both companies were in the business of selling healthcare products before and after the 31 July 2014. Both used the trading name YANC. UK was incorporated on 28 October 2015 and so the YANC business in the UK as well as worldwide must have been carried out for a period by R4 in succession to Afterthought.

64.22 We consider this to have been a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 because the business of providing healthcare products under the name YANC was a stable economic entity which retained its identity.

64.23 There is no documentary evidence of a payment to the claimant by any other entity or legal person than Afterthought, R4 or Corporation. The payments by Corporation are evidenced by invoices and that suggests that the claimant was a freelancer. Those invoices were presented to a trading name rather than to a company. There are payslips to the claimant in the bundle from Afterthought and also from R4. The payslip at page 1492 dated 31st March 2014 from Afterthought showing a gross pay of £675. The next payslip in time is that for R4 dated 29 August 2014 also showing a gross monthly payment of £675 (page 1492).

64.24 As we have indicated, the claimant relies upon her bank statements for 2008 to 2009 as evidence to indicate that she was paid the sums that she says were agreed as being her wages directly without deduction for tax and National Insurance contributions. Her explanation as to why she could not produce her bank statements for other periods was that in December 2019 she had asked R3 to burn her bank statements. She said that she had taken them to the office because she wanted to make digital copies of them but had not felt safe to ask him and he had burnt them. For that reason, she said it had been very, very difficult for her to compile a complete list of the bank statements. In many ways this explanation begs more questions than it answers. What it does not do is provide any explanation as to why the claimant was not able to provide copies of bank statements from her bank, albeit at a probable cost.

64.25 In cross examination the claimant was asked whether she agreed the sums that the respondent says it was agreed that she was to be paid by way of salary. She accepted that she received several above inflationary pay rises. The payslips, which are not a complete set, do not show any increase in salary for the whole of the rest of the claimant's employment by R4 and that is contrary to the above accepted position. The payslip dated 31 December 2017 shows a gross payment of £676.44 – a marginal increase on the 2014 amount. As does that for 31 Janaury 2018 (pages 1513 and 1514). That for February also shows the same amount. Then in March 2018 she was paid Statutory Sick Pay of £339.53 which was paid each month from March to August 2018. A figure of £186.75 was being paid in September 2018 by way of Statutory Sick Pay (see pages 1516 to 1522).

64.26 The claimant accepted that her salary had stayed the same; we took that to mean the amount paid through PAYE by Afterthought and R4 had not changed. It was put to the claimant that when she started working for R4 it was agreed that she would be paid £3,325 gross per calendar month. She said that she did not remember and she complained that she had not

been given access to the system that had all of the invoices on them. She said it could be less than that.

64.27 The respondent's position is that her salary was increased to £4,000 gross pcm in November 2015. The claimant accepted that there was an increase when R3 took charge but said that without documentation the situation was "blurry as we know it was not officially documented". She claimed not to remember the amount to which it was increased. It was then put to her that in June 2016 it had been increased to £4,500 pcm. The claimant disputed this and said the increase in about spring 2016 had been to £5,000 pcm and not later that year in November 2016 as contended for by the respondent.

64.28 The parties are at odds about whether the sums agreed to be paid by R4 were gross figures or take home figures. The claimant claimed that they had never spoken in terms of net or gross and that the figure agreed had been a take home figure. She argued that the figure per month had originally been agreed with R1 to be gross and that that had carried on with her carrying on following the normal practice that she had known and for that reason she argued that any increase had been an increase in the take home figure.

64.29 Her evidence on this point was inconsistent and confusing. Her answer was also illogical. If the figure of £1,000 agreed with R1 was agreed to be gross and there was no subsequent discussion when pay increases were awarded to change the basis of the payment from gross to net then it supports R1 and R3's evidence that the agreed figure was always gross. The claimant was not 'taking home' £1,000 pcm; that may have been the sum payable to her but she was liable to pay any tax due on it because she was a freelancer when contracted to R1.

64.30 It is clear from pages 254 to 255 that when R4's payroll became operational the claimant instructed the accountants that there would be only one employee on the PAYE of R4 and that was herself. At the time she was stated to be the administrator. She accepted that she provided the figures to the accountant to go on the payroll and that she told the accountant that her income was £675 when on any view she was paid more than that.

64.31 She is claiming loss of earnings at a rate of £5,000 net per calendar month. This was not the sum that was going through the R4 payroll. The claimant declined to answer questions about whether she had declared the other £4,325 pcm for tax as a self-employed person. The explanation she gave for telling the accountant that her earning was £675 per calendar month was that that did not include the work done for Corporation or UK or as a personal assistant to R1.

64.32 There is very limited evidence that she did any work of a personal nature in 2017 for R1. Additional staff were employed from time to time to do R1's administration. There is no evidence of any conversation about the division of the cost to any of the companies to attribute part of the cost of the claimant to another company on the basis that she had a separate employment with another entity in the group. UK was incorporated on 28 October 2015 (page 1152). The claimant cannot have been doing work for it prior to incorporation, certainly not for more than a year.

64.33 R3's explanation for how the internal accounting dealt with the fact that the claimant who was on the payroll of R4 did work that was for the benefit of UK was that there was a license agreement and which sums were paid within the group. We accept that explanation. It is a straightforward and credible explanation of the facts. It is a commonplace arrangement in groups of companies and we note that the other staff of the business were all employed by UK but, no doubt, did work of benefit to R4. On the other hand the claimant's explanation lacks credibility and, on her case, did not involve an express and objectively justified assessment of the amount or value of work done for different entities

64.34 It is true that on page 586 R4 requested a medical report about the claimant's health on 14 August 2018 describing her as being "employed on a full-time basis as our Chief Operations Officer and Chief Financial Officer and has worked for us since September 2003, most recently for Ben Ong Limited (R4)" This does not seem to us to necessarily imply that she had worked for the same entity throughout or as having the same status throughout.

64.35 We accept R3's evidence in paragraph 29(d) that the claimant had her salary increased to £3,300 (this was the amended figure that R3 corrected his statement to in oral evidence).

64.36 The claimant appeared to accept that the balance of her pay over and above the £675 which was paid through payroll were justified in the accounts by invoices an example of which is at page 1539. That is an invoice of 26 May 2015 which appears to have been raised byTJ, directed towards Corporation, said to be for £1,000 on account of 10 working days as a freelance consultant. It asks for a transfer to "My associate's bank" and then provides what are said to be TJ's bank account details.

64.37 According to R3 (OS para 115) TJ is a friend of the claimant. Although the claimant said that TJ had done work at some point for one of the companies in the group. She accepted that he had not done so "during that time of the invoice" and when it was put to her that that invoice did not correspond with any work that had been done by TJ, the claimant said "we know the answer. No, it's my wages." She went on to say that it was part of her wages and asserted that she would never transfer a penny to herself more than had been agreed.

64.38 In essence, the claimant accepted that she had raised invoices to justify transfers from an offshore bank account in the name of a company in the group other than Afterthought or R4 to either herself or her nominee as a method of paying that part of her wages which was not paid through the payroll of R4. The claimant's case is that this was done with the full knowledge and indeed initially at least, on the instruction of R1. She asserted that when R3 started she had made sure he was aware of this practice.

64.39 R3's evidence about this was that these invoices were completely false, and the practice was never requested or authorised by him.

64.40 The claimant, in support of her case, refers to an email from 2009 to R1 authorising a payment of £500 to her. She alleged that payments highlighted on pages 1533 and 1534 were CHAPS payments from overseas banks in respect of pay from R1. There is nothing on the face of the bank statements to link those payments with R1 or with any of the businesses or companies that he was running at that time. In any event, historic payments such as those and that referred to on page 1537 were made at a time when we have found that the claimant was a freelancer.

64.41 Paying an employee in the UK from an overseas source of money is not unlawful, it seems to us. Nor do we consider it to be a sound basis to infer that once the claimant was a PAYE employee the director(s) of Afterthought and R4 knew that the practice was being continued by the financial controller. We are not making a judgment about matters of tax law. A focus of the case before us involved considering whether payments were made to the claimant in the expectation that she would meet the Income Tax and National Insurance Contributions payable on those gross sums and also whether the payments from overseas accounts during 2014 to 2017 were made with the knowledge of the respondents. Alternatives, did the claimant leave R4 exposed to tax fraud allegations by transferring the gross sums to herself through methods which bypass the PAYE system meaning that, so far as could be demonstrated, UK Income Tax and National Insurance Contributions and Employer's National Insurance contributions had not been paid on a significant part of her salary.

64.42 We accept that the fake invoices were not authorised by the individual directors of R4 (R1 and R3). We reject the allegation that they knew or sanctioned the claimant only telling the accountant that she had been paid £375 per calendar month by R4, as UK earned income which on any view was far short of her actual wage. At some stage UK started trading and a license fee was charged by R4 to UK to cover the value of the work done by the claimant for UK. Her statement to this tribunal that she was doing work for other entities is not based on any agreement with the directors and she seems to have just decided that she would make a judgment about what the division should be. These actions are inconsistent with the

license fee. It is also not clear why she should not be PAYE for the balance of her salary. It is surprising that she was the employee of one group in the company and a freelancer of another group in the company because that is what she is effectively alleging. We consider it unusual to say the least for an individual to have more than one employment relationship with different entities in a group of companies, but it is far more usual that an individual is employed by one company and contracted out to others in the group. We accept that the respondents knew nothing about this. We note that there has been no change in the amount paid to the claimant through PAYE despite the increases in salary. If there was a genuine division as between the companies to represent the proportion of time spent working for R4 as opposed to UK, for example, then one would expect the monthly salary paid by PAYE to increase as the overall salary did. If the claimant is right about the reason for the division, you would expect the sum to go up in any event as she received pay rises and it did not.

64.43 We draw adverse inferences against the claimant’s credibility from her willingness without authorisation to create invoices for payments to be made to individuals who had not carried out work for any of the companies in the group at the time to which the invoices related in order to cover payments that were due to her by way of salary. We also draw adverse inferences about her credibility from her refusal to answer questions about whether she has declared the balance of her income for tax purposes. Her case that the sums paid through PAYE merely reflected that proportion of the work that was done for R4 is not credible given that the overall salary increased so much over the last three years of her employment and the sums paid by PAYE did not increase at all. We also consider that she has been selective in the bank statements that she has disclosed. All of these matters mean that we have found her to be less credible, in general, than R1, R3 and JS.

64.44 The claimant was solely responsible for communicating with the accountant. For whatever reason she arranged the payroll of R4 so that the income declared through PAYE was a fraction of the income which R4 had agreed to pay her and was paying her. A paper trail through the accounts involved her creating invoices in the names of individuals who had never worked for the company or individuals who even if they had worked for the company had not done that work for the company and payments were made to those individuals on the invoices that were raised by the claimant in their names. By doing so, she has left the company open to the events which transpired because they did not declare the full amount of income they were paying to their employee to HMRC, did not make deductions for Income Tax and Employee’s NICs before paying her salary, did not account for tax and NICs to HMRC and did not pay full employer’s NIC. This was during the period that the claimant was the CFO.

<u>What were the terms of the claimant's employment?</u>

64.45 There is a dispute about whether the terms in the company handbook concerning company sick pay and annual leave accurately reflect the contractual terms for those benefits. The handbook is at page 841 and it is headed "Ben Ong Employee Handbook". The claimant was the only employee of R4 the other employees were employed on contracts of employment with UK. However, this handbook is not limited to applying to a particular company. It was introduced after the claimant's employment started since her employment was transferred from Afterthought. However, we are satisfied that in her position in the company she was well aware of the existence and application of the handbook. The particular conditions relating to sickness pay are at page 848 and provide "You are entitled to Statutory Sick Pay (SSP) if you are absent for four or more consecutive days because of sickness or injury provided you meet the statutory qualifying conditions.

64.46 There is provision for payment in excess of SSP in paragraph C)5) (page 848) but it is clear that it may be allowed at the companies' discretion. The claimant gave evidence, in particular in her paragraph 320 and following, that company sick pay over and above the statutory requirement was custom and practice. She said that it was always the case when any person was unwell that they were paid an enhanced payment.

64.47 The only specific example of such a payment that was relied on by the claimant was when she herself was paid full pay for a week in July 2017. She argued that she had been absent through sickness on other periods when she had attended at retreat for her health. However, this was counted as holiday by the respondent. It is not that we reject her evidence that she attended the retreat because she thought it would be beneficial to her health and because she considered herself to be suffering from stress related symptoms at the time. However, it is clear that she was on holiday and chose to spend her holiday in that way so the payments to her were not payments of discretionary company sick pay but of accrued annual leave entitlement.

64.48 We do not consider that the payment to the claimant in July 2017 is sufficient to establish custom and practice. The handbook expresses the usual practice and we find that it represented the limits of the claimant's contractual entitlement to sick pay. She was only absent for one week; she did some work from home at that time and it was not expected that she was going to be absent on a longer term basis.

64.49 When the claimant became ill in March 2018, the medical certificate that she provided initially indicated that she would be ill for a month (page 1331). It is our view that the payment of SSP to the claimant during her sickness absence from 5 March 2018 onwards was in accordance with

the contractual term that she was entitled to SSP and that any additional payment over and above that was discretionary.

<u>What were the terms of employment regarding pay?</u>

64.50 It is the claimant's case that the agreed figure which at the time of her dismissal was £5,000 pcm and indeed any sums that were agreed from time to time to be paid to her by way of salary by R4 were agreed as net or 'take home' figures. The claimant's paragraph 223 contrasts in this regard with R3's statement (OS paragraph 291) where he denies that that is what was agreed and says he is not aware of any business that would agree a salary based on a net figure.

64.51 As we set out above, we accept that the different salaries that the claimant was on at various different times were as put to her by the respondent. A summary of the payments that she was entitled to receive at different periods of time is that from October or November 2015 the claimant's pay increased from £3,300 or £3,325 per calendar month to £4,000 per calendar month. Then in June 2016 her salary was increased to £4,500 per calendar month and again to £5,000 per calendar month in November 2016. The claimant's only serious disagreement to the figures that were put to her was that she said that the increase to £4,500 per calendar month had actually been in March 2016.

64.52 Although the claimant referred to payments to the freelancers as being take home pay, we consider this to be a misdescription. That payment would have to be gross of the income tax and NICs which were payable depending on the freelancer's personal circumstances. The expectation was, we find, that the freelancers would be responsible for arranging payment of their own income tax and National Insurance. This would be standard for genuinely self-employed individuals. That of itself suggests that whatever was agreed to be paid to the freelancers and whatever was invoiced by them was a gross figure.

64.53 Although the claimant started on a freelance basis working for R1 when she became an employee of Afterthought she was registered for PAYE and treated by Afterthought as an employee. That is to say an employee for tax purposes and as we have set out above that is only part of the reason why we have concluded that she was indeed an employee employed under a contract of employment. Since the claimant was responsible for transferring payments to herself the only basis on which the payments that she had arranged to be transferred to herself could support a case that it was agreed that she wold be paid £5,000 pcm gross would be if she transferred £5,000 to herself and then caused the company to pay NICs and income tax at the relevant rates both to satisfy her own liability to pay National Insurance and the company's liability to pay employers National Insurance. She did not say in evidence that she thought that R4 would be paying the tax or that she caused R4 to pay tax

and National Insurance contributions for her. She does say in paragraph 223 that the respondents chose to avoid deductions for tax by paying people through different methods and that that was not her decision. We simply find this to be an incredible assertion given that the claimant was the Chief Finance Officer. She also was the sole person who was communicating with the accountant. She had sole access to the bank accounts.

64.54 Page 811 is part of LW's investigation which records questions and answers in a conversation with the claimant. In that the claimant seeks to argue that she had not been moved to what she refers to as "normal pay" because she thought her net pay should not change (second bullet point on page 812). However, her salary increased by approximately 50% between March 2015 and November 2016.

64.55 She stated in answer to the question at the bottom of page 811 that the company should be responsible for paying tax and that she was simply following the system that had been set up previously. If the latter were the case, then the transfers that the claimant made were themselves consistent with her following an agreement that her pay would be £5,000 per calendar month gross of tax because as a freelancer it would have been her gross income that she took home.

64.56 Our clear finding is that when figures were agreed between the claimant and R3 those figures were intended to be by both parties to be gross of income tax and National Insurance and we find that by the time of her dismissal her contract entitled her to an annual salary of £60,000 gross.

64.57 The claimant has also complained that it was agreed that she would be provided with private medical insurance. R3 disputes this and gave evidence that the claimant wished to have private medical insurance and explained to him that she could achieve an advantageous rate were she to arrange for the insurance through the company. He said that he agreed on the condition that she would reimburse them for the cost of the private medical insurance because this was not a contractual entitlement to benefit. We accept his evidence on this and find that it was not a term of her contract of employment.

<u>In arranging payment of her salary, did the claimant follow a method of payment which was approved by the directors?</u>

64.58 There is a factual dispute between the parties about the method of payment of the claimant's salary. The claimant alleges that by paying herself through PAYE only the minimum amount set out in the payslips but causing transfers to be made from CBT, the overseas bank account operated in the name of Corporation, and then causing an internal transfer from R4's account to Corporation take place, she was only continuing a practice that had not only been sanctioned by but that she had been

instructed to follow by R1. On the other hand, the respondents say that on no occasions was the claimant authorised, once she became a PAYE employee of any company, to pay her salary in part through PAYE and the balance as a transfer from an offshore bank account.

64.59 As we say above, we have found R1 and R3, in general, to be more credible witnesses than the claimant. We accept that this method of payment was not done with their knowledge or authority. That being the case, once they uncovered the recently dated invoices apparently raised by the claimant and others who had not been working for R4 in that period, we accept that R1, R3 and JS believed – in fact had every reason to believe - that the claimant had been failing to declare her income for tax purposes. At the very least they had every reason to believe that she had been causing R4 to pay an employee's salary (namely her own) without putting the entire sum through the payroll thereby putting the company at risk of liabilities to HMRC as, in fact, transpired.

64.60 The claimant had been generating invoices as if from third parties who had not produced the work charged for, either for R4 or for the company to whom the invoice was directed. In this she, the CFO, was creating invoices that misrepresented the situation. Full details of the payments that were made by the claimant and the payees are at pages 1548 and 1550, which were created during the respondent's investigation. They support the claimant's evidence that she did not transfer to herself any sums that were not authorised by the respondent – if you take that in simplest terms to mean that the payments do not exceed £5,000 pcm. However, from October 2017 onwards the payments did not total £5,000 in any particular month. As we detail below, she was granted a £10,000 bonus and it appears that irregular payments were made in satisfaction of invoices to the claimant and to two other individuals to pay that bonus over a period of time.

<u>2015 onwards</u>

64.61 R1 retired as a CEO of R4 in October 2015. R3 became CEO and the office of R4 was moved out of R1's home. We accept that R3 wished to draft a service agreement for the claimant as he sets out in his paragraph 49. We also accept his evidence that the claimant did not like the fact that the company was becoming more structured and was resistant to his attempts to formalise a job description for her, R3 was growing the business and it needed to become more structured. It seems to us that there were sound business reasons why this should be the case.

64.62 R1 and R3 had what they believed to be a positive meeting with the claimant on 17 November 2015. According to R1 (his paragraph 42) it is from this point that the claimant was not asked to do any personal finance for him, and we accept that evidence subject potentially to a small amount

of work on rare occasions when there was no employee specifically tasked with R1's personal affairs.

64.63 Although the claimant took issue with whether it was at that meeting or a subsequent meeting, she accepted that R3 wanted to discuss a job description for her. In her witness statement at paragraph 53 the claimant said that she was offered the position of CEO for other ventures within the group at this meeting and she said she thought that was inappropriate because she contrasted that with R3 being given the role of CEO of a business that she knew. This suggests to us that she was resentful to some extent of the involvement of R3 in the business notwithstanding having, at that point, a positive relationship with him. The claimant's reaction to the meeting in an email of the following day, 11 November, at page 277, does suggest that something happened at the meeting which did not please her:

> "I am not in the good place right know (sic) to come to the office and to be around people. I have forced myself and tried but it's obviously doesn't work for me. The wounds are too deep and raw and all the conversations etc aggravate it even more."

64.64 She continues by saying that she will not be available to be contacted by email or by phone but hopes to gather strength by next Tuesday. The wording of her email does not seem to us to be indicative to the reasonable reader of a long-term problem as opposed to a reaction to change that was unwelcome to her. Viewed objectively, the details of what was put forward by the respondent in this meeting showed every intention of keeping the claimant within the business and that she was of value to them. Although, as appears from the claimant's witness statement she did appear to be resentful of R3's appointment as CEO on R1's retirement, that was a decision for the directors to make.

64.65 The opening line of R3's response is "To be honest I am confused as to what has caused this." R3 was understandably confused by the claimant's unwillingness to communicate which he described as unlike her and "the height of unprofessionalism". He complained that she is the sole source of information and the only person able to make transfers. He referred to her having been encouraged by the respondents to believe that there is an opportunity for advancement available to her. It is at this meeting that she is given a pay rise to £4,000 pcm and a senior title. It is also accepted by her that the company had spent £3,000 on a training seminar for her as is referred to in the email response by R3. The pay rise, the title and the training were accepted by the claimant to have happened as alleged. These are matters which, objectively, show R4's commitment to her as an employee.

64.66 Despite expressing his annoyance with this behaviour R3 said that R4 was willing to support it. We consider the claimant's account of the impact on her of this meeting (paragraph (11) of her impact statement at page 1296

of the bundle) to be inconsistent with the pay rise that she was given at this point and the respect that she was shown by the respondents generally. Among other things, she states there that she requested the role to be formalised when it was in fact R3 who wished to have a formal job description and the claimant who was obstructive to that goal.

64.67 It is worth noting that the claimant was paid a lot more at this point than was R3 the newly appointed CEO. From this point she was styled the Head of Operations and Finance or Chief Finance Officer.

64.68 There was an agreement between the claimant and R3 on behalf of R4, that she would work from home for some of the time from early 2016. We note R3's paragraph 94 where he says that after the Claimant had received a pay rise in June 2016, she began to take additional days out of the office each week;

> "Prior to this she worked four days a week. However, she began to stop coming into the office as frequently being in the office only two or three days a week. There was no pattern to the absences and rarely any notice. Often, she would just call me in the middle of the day to say she was working from home. In their exit interviews [RK] and [AR] raised this as an issue that prevented them from doing their jobs. They simply did not have access to the computer systems and if the claimant was not in the office to give them the data, they were unable to fulfil a lot of their responsibilities."

64.69 R3 goes on to say (his paragraph 95) that by December 2016 the entire Operations and Finance Team had left, and the claimant insisted to him that she was capable of running the department without them. Concern was apparently then expressed by the accountants that the company was behind on the process for submitting financial details to HMRC. The claimant then reluctantly, according to R3, agreed that she needed a bookkeeper and one was hired in Janaury 2018. It therefore seems to us that the claimant is both saying that she was overworked at this time in her evidence to us but was reluctant to allow R4 to recruit assistance.

64.70 R3's actions are consistent with him having wished to be more rigorous in the administration of R4's affairs. It is also consistent with this that he realised that staff should be paid via PAYE and took steps for the other staff to be put on the payroll of UK. The only exception was an individual who had another client and whom R3 accepted as genuinely being a freelancer for that reason.

64.71 The claimant claims that in July 2017 she suffered psychological mental burn out (see paragraph (13) of her impact statement at page 1297). In that paragraph she describes experiencing the following symptoms: that she could not leave her bed; that she could not eat or dress; that she had persistent severe migraines; that she was crying from the nerves, and that she was unable to speak in coherent sentences. She had, as we say, persuaded R3 to permit her to cause R4 to take out private medical

insurance for her because she wanted access to acupuncture treatment and there was a delay in the availability of that service via the NHS.

64.72 The claimants visit to her GP at about this time on 10 July 2017 (page 1358) appears on the face of it, as the respondent says, to be connected with a dental appointment. The problem that is recorded is that she is tired all the time. And she describes having a bloated abdomen. Blood tests were ordered which all were within normal levels. At a follow up visit she told the GP that she had been feeling better and accepted in evidence that that had been what she had said. However, she did say that she was feeling better compared with three days previously when she had been, as she put it, “not great”. This improvement is consistent with the text she sent to R3 on 21 July 2017 when he asked how she was and she responded, “I am definitely functioning better thank you for asking”.

64.73 This causes us to conclude that neither the medical evidence nor the contemporaneous communication from the claimant to R3, suggests that the impact of stress that the claimant describes at that time amounted to or resulted from a prolonged problem. The claimant confirmed in oral evidence that she does not believe in conventional medical treatment and in particular, she did not wish to take medication for a low mood.

64.74 She next attended the GPs on 18 September 2017 when she was experiencing a migraine and she wished to obtain a referral letter to an acupuncturist. This must have been the treatment for which she obtained private medical cover. There is no evidence in the GP’s records of the claimant attending again until 5 March 2018. On that occasion the problem is described as “anxiety states” and she was certified unfit to work.

64.75 It is of course entirely the claimant’s prerogative to choose which forms of therapy she consents to for the health problems that she has or had. However, the only visit to the GP between July 2017 and March 2018 was in September for a migraine. The records therefore provide no medical evidence of the impact the claimant alleges that she experienced of mental health conditions between July 2017 and March 2018. She accepted that she had not said anything to the GP about stress and anxiety, depression or PTSD in July 2017. Her explanation was that she had never known about the mental health problems and did not know how to report them.

64.76 There is a part letter dated 28 October 2020 recording a conversation between the claimant and Dr Bajaj who appears to have diagnosed chronic fatigue syndrome with comorbid anxiety and depression at that later time. The letter is only produced in the bundle in part; pages 1, 3 and 5 being at pages 1306 to 1308 of the bundle. The claimant apparently described to Dr Bajaj that she had generalised pains and body aches that she had experienced since July 2017. Although this appears to be what

she told him in October 2020, we find – on the basis of the entries in the GP notes – that she did not report the symptoms in the same way to her GP contemporaneously.

64.77 The medical evidence does not support the full extent of the health problems which the claimant now claims in oral and statement evidence to the Tribunal to have been experiencing from July 2017 onwards. She was largely working from home throughout this period. Her oral evidence was that she had not at the time thought that it was a mental impairment but a physical impairment. The acupuncturist's report is at page 1254 and is dated 18 September 2017. The claimant had recounted suffering "headache since August with increased frequency and duration affecting her function ability, worse under stress." The acupuncturist also describes the claimant reporting nausea when working with the computer "paresthesia in the hands, and neck and shoulder stiffness". The GP record of the visit to obtain the referral letter does not indicate that the claimant recounted these problems to him.

64.78 There was at least one meeting between the claimant and R3 in a park. R3 said that it was in the middle of July 2017 and the claimant was unclear whether it was then. She was asked in oral evidence about R3's evidence that at this meeting she had told him that the difficulties were spiritual and not medical. She conceded that they had spoken about spirituality a lot. When counsel attempted to pin her down as to whether she had told R3 that what she was experiencing was a spiritual impairment she said she might have done. She was then asked about R3's evidence that she had said him that she wished to work remotely and not surrounded by Wi-Fi, people and urban living. Her first response was that that had not been at the July meeting but on 5 August after she had returned from the health retreat. She then denied that she had asked to work remotely but said that she had found it very very difficult in London and needed to go to the woods the majority of the time and it was clear to us that she had accepted that she communicated that to R3 in a meeting held outside at her request. She said that it was R3 who offered that she could work remotely and "I was so grateful, I really wanted that to be the case when he offered I was very grateful."

64.79 Although the claimant was reluctant to accept that this meeting had taken place in the middle of July being adamant that it had taken place after she had attended a health retreat, there seemed to us to be a certain amount of common ground in that the meeting took place outdoors because the claimant expressed a desire to meet in the open air. The claimant did not at that time herself think that she was suffering from a mental impairment and probably did say that the problem was spiritual. The claimant probably did tell R3 that she had visited the GP. She gave evidence that she had told R3 the same thing she had told the GP but the GP's notes do not suggest that, whatever words she used, it conveyed the degree of distress that the claimant now claims to have been suffering at the time.

64.80 We conclude that it can fairly be said that whatever words the claimant did use, that would not have indicated to the reasonable employer that she had any medical condition that was likely to amount to prolonged problems and, as a matter of fact, that did not communicate to R3 that she was suffering from any long term or underlying medical condition.

64.81 A message at page 1253 of the bundle dating 14 August 2017 evidences the claimant telling R3 that she had some sort of assessment carried out before and after the retreat, "and depression was very bad when I have arrived on the scale (1-22 worse) and it below 10 now." R3 responded later the same day saying that he was free on Tuesday to meet in the office or somewhere for a coffee. This was the 10-day meditation retreat that the claimant attended that we have already referred to. This was not a certified sickness absence but a retreat that she chose to take while she was on holiday. This is why we do not regard this as providing evidence that she was paid company sick pay. The payments that she received during that period were because it was paid annual leave.

64.82 This text exchange comes on the back of a text at page 270 of 11 August 2017 where R3 said:

> "Hope your retreat is rejuvenating and enjoyable and that you are feeling better. I didn't want to have to disturb you but there are a number of issues that cannot be ignored could you check your email from [J]. The Halifax card is overdrawn and the bank feeds are not updating. Many thanks."

64.83 It then appears that R3 sorted out the particular banking problem the same day and he texted the claimant on 14 August asking her when she would be back in the UK "trying to keep most of the work off you at the moment but I do need you to update the bank feed passwords."

64.84 We make two deductions from these exchanges. First, they support the respondent's case that the claimant had online access to the bank accounts and R3 needed to visit the bank in person in order to give any instructions. Secondly, R3 in both of these texts expresses the hope that the time on the retreat is doing the claimant good and apologises for disturbing her only doing so because of a particular financial need that only the claimant can deal with. This consideration is completely at odds with the claimant's description of being continually pressured to work during holidays and generally being treated unreasonably.

64.85 There was then a meeting on 15 August and, again, R3's recollections (para 136 of his statement) were that the claimant attributed her ailments to a spiritual illness which she did not blame on stress but on her spiritual energy being drained by urban living and modern technology. These are his words not hers. However, as we have set out above, in broad terms the claimant accepted that that was what she had told him.

64.86 Following the retreat, the claimant went on holiday to Thailand in August and returned in September 2017 (R3 para 155). R3 and the claimant met again, once more in a park. The claimant's account is in her impact statement at paras (15) to (18) - page 1297. According to that account, her symptoms were significantly worse at about this point with constant migraine, cognitive disorder, an inability to concentrate, poor memory and feeling nauseous. It is at this point in time that she is referred by her GP for acupuncture for migraine. She describes in her impact statement that the respondents in essence, did not take her health seriously, "I later discovered that I was hypersensitive to 4G, Wi-Fi and electromagnetic radiation as well as being sensitive to light/noise. When I had informed [R3} about it earlier, I was ridiculed and at a later stage during investigation report I was blatantly accused of spending unauthorised company funds". This last comment is in relation to her complaints that the company refused to pay for salt lamps which she believed would absorb Wi-Fi radiation.

64.87 Her complaint in paragraph (17) of the impact statement about being overworked and under a significant pressure to continue to work is completely at odds with the directors allowing her to continue to work from home despite the inconvenience that that caused through being unable to meet with the fiancé director in the office. We reject the claimant's allegation that she was put under any such pressure.

64.88 Indeed, her account is diametrically opposed to R3's (see his para 158) where he accepts that the claimant said she did not wish to return to the office for reasons of negative spiritual energy and avoiding Wi-Fi radiation. He recalled a particular explanation by the claimant who apparently told him that she needed the right crystal to provide her spiritual energy and told him that the healing crystal had to find her.

64.89 The claimant was understandably sensitive to what she perceived was a lack of respect for her views and we do not in any way pass judgment upon them. R3 seemed to us to recount the incident to illustrate his impression that the claimant told him that her *spiritual* energy would be adversely affected if she worked from the office but seemed to him to be in good *physical* health. He explained that she had told him that her holidays had been rejuvenating and that she was feeling better.

64.90 When the claimant was asked in cross examination to confirm that the conversation happened, her response was to the effect, "We would talk about these issues. I cannot confirm these words. Not specifically these words." She did accept that she had been better after she had taken time off and we find that in broad terms R3's account of the meeting was accurate. We have considered whether in spite of the way that the claimant presented her difficulties to him as being spiritual rather than physical or mental, R3 should nonetheless have realised that there was a mental component to them. However, the claimant was not seeking

medical support for her professed ailments. Nor was she seeking assistance from counsellors or other alternative therapists apart from the acupuncturist to whom she had reported migraines.

64.91 We accept that these options were suggested to her by R3 (see his para 163) and the claimant accepts that she declined to do so. We find that she did not at that time describe the symptoms that she now professes in such extreme terms to him in any of these meetings. Furthermore, she conveyed to him her then belief that the problem was not medical.

64.92 It seems to us that the visit to the GP for the referral letter to the acupuncturist shows that the claimant, on occasion, self-diagnosed and used the GP to obtain treatment that she considered necessary,

64.93 The claimant is now saying that these various matters put R3 on notice that she had what she now knows is chronic fatigue syndrome. The first question is whether we accept that she was in fact experiencing when not away from work impairments to the degree that she is stating now she suffered continuously from July 2017 onwards. It is clear that she did not describe them in that way to her GP at the time. She attributed problems which she did report, such as the migraines, to something that does not amount to a medical impairment but to a spiritual disorder. That is unlikely to equate to and would not reasonably be considered by an employer to equate to a long term condition.

64.94 There is no medical evidence after September 2017 that she sought further treatment until she next visited the GP in March 2018 (see page 1357) when diagnosed with “anxiety state”. There is no medical evidence to support her evidence that she had continuous impacts of any particular impairment.

64.95 We do not accept that anything suffered then was an early manifestation of the chronic fatigue syndrome which she was only diagnosed with in June 2020. We reject her evidence that her descriptions were met with derision by R3 who we accept encouraged her to go and see a doctor or recognised therapist and we accept R3’s evidence that the claimant did not describe the effects of any health condition in terms that would cause him to think she was suffering any of the symptoms she now professes such as poor memory, nausea and constant exhaustion.

64.96 The arrangement for the claimant to work from home was reached in September 2017. The claimant did ask that R4 recruit an assistant for her and accepted in the September meeting that it was not viable for her alone to carry out all financial activities. R3 therefore agreed that someone needed to be recruited who could take work off the claimant. She said that she needed someone she could trust. JS was appointed in October 2017.

64.97 R3 also asked the claimant in the first September 2017 meting about tasks which were necessary, and which were not being completed. We accept the accuracy of the details set out on page 819 within LW's investigation report showing the claimant's activity logged onto CRM between 5 July 2017 and 2 February 2018. This shows that she was not logged on to the system in July, only once in August and not at all in September 2017.

64.98 The claimant was notified of JS's appointment on 21 September 2017 (see page 348).

64.99 There was another meeting between R3 and the claimant towards the end of September 2017 in a café. It is referred to in an email from R3 on page 358. The claimant then emailed R3 on 11 October 2017 asking for a meeting on 13 October (page 360). There is divergence about precisely what was discussed in the September 2017 meeting and what in any 13 October 2017 meeting but some common ground about what was discussed as a whole and whether these matters were discussed at the end of September or beginning of October does not affect our conclusions.

64.100 As a result of what the claimant told him in the meeting at the end of September 2017, R3 recognised that the claimant lacked interest in the job or in the role working for R4 and there was then a discussion between them on a personal level that was more to do with his response as a friend than as the CEO of R4. We accept that R3 was concerned for her as an individual and wanted her to be able to do what she wanted so that she could be personally fulfilled. It is common ground that R3 offered the claimant a £10,000 bonus and we accept his evidence that he did so essentially to make her feel valued and to try to revive her interest in the business.

64.101 The claimant accepts that she disclosed to R3, a substantial credit card debt which she said was £25,000, although her recollection was that this was at the later meeting. R3 offered personally (by which we mean not on behalf of R4) to pay off the credit card debt to enable her to leave employment with R4 if that was what she wanted. His rationale was that she expressed herself as feeling tied into a role she was no longer enthused by because of the size of the debt. We accept that this was the offer of a friend attempting to help another friend out of a difficult situation and not an attempt at a negotiated termination of employment. The fact that the claimant characterises this as R3 questioning her reality (as she described it in her oral evidence) is extraordinary because he was making a really generous attempt to keep the claimant on side by offering the £10,000 bonus and then when she said she needed £25,000 and in the context of her having said how unhappy she was in the role, he attempted as an individual to address what could be done to enable her to be happy. The claimant accepted in cross-examination that R3 did not have funds or income to be able to lay hands on such a sizeable sum with ease and it would have been a significant outlay for him. We infer from this offer that

R3 at that time cared for the claimant as an individual who had worked with his family businesses and for his father for a long period of time.

64.102 We accept that the claimant also said that she wanted to move to having a profit share of the business and it seems to us that the claimant in some sense regarded the business as hers. We further think that it is probable that, as R3 said in evidence, that the claimant intimated to him that she was not disclosing her whole income to the Department of Work and Pensions when making a benefits claim. Although he did not make further enquiries at the time it caused him understandable concern.

64.103 When asked about some of the detail of this conversation the claimant was evasive, in particular when asked whether R3 had offered to pay off her credit card debt. However, the essential details of the conversation did not seem to be disputed. The words she used was that when offered the £10,000 bonus she had said that wasn't enough and had asked for it to be £25,000 so that she could clear her debts and start from scratch. She had described herself in oral evidence as being £25,000 in debt. Although she accepted that he had said that he was willing to help her and do whatever needed to make her happy (volunteering that both R1 and his wife had said to her what will make you happy) the claimant's account sought to cast the offer to pay off her £25,000 debts as an attempt to get her to exit the business. We reject that and think it more likely that the desire that the claimant should be able to do what made her happy was linked to R3's offer as an individual to give her the wherewithal to enable her to do so.

64.104 R3 sent an email to the claimant on 3 October 2017 (page 358) making formal offer of the £10,000 bonus, saying that' she could take it as she saw fit but rejecting her request for a profit share. Although he does towards the end of the email also set out his ideas on for what amounts to an incentive plan which would formalise a bonus and work out how the claimant's impact on the company's performance might be measured.

64.105 R3 had told R1 about his offer to pay a £10,000 bonus by email on 4 October (page 364). In this he described himself as open to a future profit share but sceptical about it because of under performance of the claimant. He has taken the view that this is the best way to incentivise her. In the email R3 describes the claimant as having disparaged "the new member of her department" to a third-party supplier. The new employee in question is JS. The email where the claimant was critical of JS is at page 355.

64.106 It seems that R3 in his description of the meetings which we find took place at the end of September and on 13 October, in his paragraphs 179 to 187 has put together the events of two meetings. Despite this error we consider that his recollection about what was said by the claimant and the reason why he made the offers he did are truthful and honest.

64.107 As we have indicated R3 asked the claimant whether she had seen a doctor and she said she had not. She also refused the suggestion of therapy.

64.108 The claimant visited the office on 24 October 2017 for what seems to have been the first time since JS had been appointed and possibly the first time since she started to work remotely. JS was occupying the desk that had previously been hers. We reject her accusation that this was an attempt to exclude her from matters. The bonus payment of £10,000 gross was wholly inconsistent with that. We accept that it was an attempt by R3 to revive the claimant's interest in the business despite the misgivings that he expressed in the email to his father. The reason we say that is because of the terms that he used in his email to the claimant which were encouraging (see page 358).

64.109 Separately, and most unfortunately, the claimant's mother was diagnosed with leukaemia in November 2017 and she travelled to Belarus to support her. She returned to the United Kingdom in December 2017 and attended the office party. She accepted in her oral evidence that she had not said anything about her health when she attended that party and accepted that people would not have noticed that anything was wrong.

64.110 According to the subsequent GP's report of 17 September 2018 on page 1277:

> "At the current time Tatsiana is suffering from Depression and Anxiety. This started around the beginning of March 2018. A formal diagnosis of Anxiety was made on 5 March 2018. She has since been back to the GP a number of times since 5 March 2018 for support and advice on treatment options. Tatsiana does have a medical condition that would impact her ability to attend and function at work. When she has seen the doctor she has described symptoms of acute anxiety and depression and she has described how it has impacted on her normal day to day activities. Her symptoms have lasted since March 2018 and it is difficult to determine how long this condition will last. It is difficult also to determine at this time whether Tatsiana's condition will worsen or improve or remain the same. Tatsiana's current notes go back to December 2007 and I can confirm that between December 2007 and March 2018 there is no documentation for past history of depression and anxiety."

64.111 Page 1279 is a letter from Anita West, a Mental Health Social Worker dated 15 Janaury 2020, referring for an assessment on 9 July 2019 and subsequent one to one sessions. This appears to have been prepared ahead of the preliminary tribunal hearing. Ms West reports "Tatsiana has expressed her emotional concerns which give the impression that she is experiencing post-traumatic stress symptoms." We not only do not need to but should not take into account evidence which postdates the period relevant for the claim in considering whether an individual was disabled. However, we note that this does not amount to a diagnosis of post-traumatic stress disorder. What this mental health social worker says is

couched in very careful terms. She may not be someone who was able to categorically diagnose it. The cognitive behavioural therapist who wrote the report on 24 January 2020 refers to a self-report of symptoms from a questionnaire indicating severe symptoms of post-traumatic stress disorder (see page 1280). However, we have not been shown a diagnosis of PTSD and, what is more important, there was no contemporaneous independent evidence that she was experiencing symptoms of PTSD during the period relevant for this claim.

64.112 While the claimant was away in Belarus, her contribution to work did not increase. The fact that she was doing virtually no work is borne out by the analysis of her times logged into the system at page 819. According to R3, he tried to address his concerns about the lack of productive work done by the claimant, and we accept that. We reject the claimant's alternate account that he was unreasonably trying to force her out. It seems to us that the problems with the claimant's lack of contribution became apparent after JS was appointed because he was unable to access the bank accounts as he explains in his paragraph 36 and following.

64.113 Eventually, R3 obtained access to the bank accounts for JS. The latter describes how, once he had access to the bank accounts including the offshore account CDB, he became aware that the claimant was using the offshore account to pay herself. R4 had some freelancers working abroad and JS thought that was the purpose of the account; since the money came from the UK and was already subject to UK Corporation Tax he did not see that it was problematic for the company but did not think it was necessary (JS para.41).

64.114 He was responsible for payroll only of UK employees and was not responsible for the claimant's salary or how she was paid but he did take a look at the finances generally and considered that R4 was "cutting it very close to being able to pay all the other salaries" apart from the claimants in the month. (para 43 of JS' statement). He raised his concerns with his brother in late November 2017.

64.115 As R3 explains in his para 191 he decided to take professional advice after the Christmas holiday.

64.116 We accept in broad terms that by October/November 2017 R3 had concerns about a lack of commitment on the part of the claimant. These were based upon the claimant's failure to carry out core tasks that were her responsibility and obstructive behaviour around the appointment of JS in relation to giving him access to the bank account. He was also concerned about the way the claimant described JS to third parties, about JS's own concerns, as a fresh pair of eyes, about the finances of the company generally and about practices such as IT security and where the claimant was being paid from. These brought things to a head and were

the reasons why R3 decided that more formal actions needed to be taken. He considered the claimant to have "basically done no work" since she had gone to Belarus which he did not think was explained entirely by the support she needed to give to her mother (para 194).

64.117 After the visit to London on 6 December 2017 the claimant returned to Belarus. It appears from page 395 that her plan was to travel on 22 December 2017. She had decided to home school her son and it was not clear how she was going to combine that responsibility with her responsibilities to R4.

64.118 There was correspondence between R3 and the claimant between 12 and 19 January 2018 (pages 405 and 432 to 433) which show R3 attempting to set up a meeting. On 16 Janaury at page 433, he expresses concerns as follows:

> "Whilst I understand that your ultimate wish is to shift your priorities around to enable you to travel more and take longer holidays as well as to home school your son I am concerned that there are fundamental day to day elements of your fulltime role as CFO and COO that are being neglected or having to be picked up by other members of the team. As a senior member of the team we need you to be present and fulfilling all the elements of your role which I am concerned is not currently happening. "

64.119 We are reminded that the claimant was the most highly paid member of staff and R3 sets out in that email matters which he considered to be particular elements of the role that were being covered by himself, JS and other members of staff as well as explaining that he thinks he would have benefitted from input from the claimant into other large projects. He explains that he wishes to discuss these concerns in person and asks when she will be back in London.

64.120 Eventually a meeting took place by Skype on 22 Janaury 2018. A near contemporaneous account of the conversation by R3 given to the investigator is at pages 441 to 442. He describes the claimant as being hostile and adversarial and refusing to engage with the subject of the call. He then attempted to have a protected conversation under s.111A of the Employment Rights Act 1996.

64.121 The instruction to the investigator is dated 24 Janaury 2018. The following day R3 asked the claimant if she wished to continue with pre-termination negotiations and on 29 Janaury the claimant wrote (page 445) saying that due to her poor health she was undergoing some medical examination in Belarus. The respondent asked for clarification of the health condition and which doctor she was consulting (page 446).

64.122 We do not consider there to be anything to criticise in that enquiry. The employer does not at that point know whether the claimant is saying that she is unfit for work but would need to have her duties covered if that was

the case. We do not think it appropriate to read into the questions any judgment about whether the condition that the claimant was reporting is genuine.

64.123 At some point over this period the claimant ceased to have access to the bank account because of her own inactivity and not due to any action of the respondent. On 30 Janaury 2018 (page 447) the claimant responded to R3 making complaints about how thing had proceeded since the appointment of JS and complaining about his performance in the role. She refers to suffering:

> "terrible migraines that are worsening when I use a computer for a long time, I have been undergoing acupuncture treatment referred by a GP in London which is helping together with reducing computer time and managing stress which is impossible in the current circumstances

64.124 She also referred to undergoing a cardiologist and gynaecologist examination but whatever those refer to they do not appear to be matters that the claimant relies on within the course of these proceedings.

64.125 R3 explains in his paragraph 203 that on 31 January he decided to proceed with a formal disciplinary investigation into the claimant's conduct and performance at work and to suspend her from her duties pending the outcome of that investigation. She was informed of that suspension by a letter at page 454 which was sent by email on 31 January (see page 453). She was told that the investigation is into "Allegations of misconduct including but not limited to unauthorised absence and concerns surrounding your performance and management responsibilities".

64.126 She was informed that the email account has been suspended. The claimant may not have received the hard copy through the post. The email which was sent to a personal account as well as to her work account to which she did not have access. It seems that she did not receive the email before the morning of 1 February when she contacted the IT consultant who was himself also located in Belarus about her access to the work email. He told her that he had been told by JS that she no longer worked for the company and the password should be changed. That is not what he was told by JS; see the email on page 449. JS told him that "Pending a formal investigation for misconduct we have to suspend Tanya's account".

64.127 It is apparent from page 458 and exchange of texts between the claimant and R3, that unknown to R4, the claimant's personal email address was no longer in use. R4 did its best to draw the suspension to her attention. The claimant was told in that text by R3 that he had sent an email to the Hotmail account setting out his concerns and saying that a formal process was being started. Over the course of the next few days R3 asked the claimant to tell him how he was to communicate with her by asking for her

new personal email address. On 5 February R3 informed the claimant that he was going to send the letter explaining her suspension by Skype. On 6 February the claimant was told that LW had been appointed the investigator and by 9 February they were in contact.

64.128 The investigation report and an invitation to a disciplinary hearing to take place on 2 March was sent to the claimant on 28 February (page 467). The allegations against her at page 468 and following include that she has failed to perform all of her duties as Chief Financial Officer to the required standard. And at 6 that “As the company’s Chief Financial Officer you have ensured the payment of your fulltime salary in such a way as to avoid appropriate deductions of tax and National Insurance being made”. The claimant asked for a postponement of the meeting and that was granted until 8 March (page 472). The claimant instructed a representative who advised the claimant in terms set out in the email that the claimant had voluntarily disclosed on 4 March 2018 (page 476).

64.129 A suggested response is included which includes a suggestion that she tell her employers that her GP has declared her to be unfit to work. In fact, her contact with her GP was made on 5 March so, even though the claimant may have been experiencing the symptoms that she described to her GP on 5 March, as at 4 March she cannot have been certain that her GP would consider herself to be unfit to work. The claimant wrote in the terms suggested by LP (page 478) and asked the respondent to communicate directly with her consultant. She made a Data Subject Access Request. The disciplinary meeting was further postponed. In the body of the email as suggested by LP the claimant said that:

> “I understand that I was suspended on full pay, and realised that I will now be processed as being on sick leave and therefore my pay will change to that of being in receipt of SSP. I will be grateful if you could provide copies of my payslips.”

64.130 R3 responded to the DSAR on 9 March 2018 (page 484) and on the second page of that letter expressed his sorrow at hearing that she was not well and had been signed unfit to work. He noted her request for contact only with LP but said that as their employer they would continue to contact her directly. “Any contact however will be limited to only what is necessary and reasonable in the circumstances”. The disciplinary hearing was postponed to a date to be fixed.

64.131 The claimant wrote to R3 on 13 March 2018 proposing that they meet outside the formal procedure. We see from her new GP’s referral letter of 23 March 2018 at page 1458 that she was referred to a neurologist and is described as “under a lot of stress at the moment and is getting migraines. She tends to forget things more and is not sleeping well.”

64.132 On 27 March 2018 R3 wrote to LP (page 522) in response to a letter form the representative saying that the claimant had instructed her that

any communication from him had been causing extreme panic attacks, stress and anxiety. She had apparently been advised not to communicate with anybody from R4. This is not withstanding the email that we have referred to above which was sent on 13 March 2018. The fact of that email seems to be inconsistent with the claimant's profession that she was caused stress by any communication with any person from R4.

64.133 In those circumstances, when R3 wrote on 27 March saying:

> "I am sorry to hear that Tatsiana is still feeling unwell but as I am sure you have explained to her as her employer it is important that we understand the reasons for her absence and her likely return to work. … Please confirm who has provided her with [advice not to communicate with R4] and whether this was the GP who issued her doctor's note? Her current doctor's note does not contain any reference to that advice and simply states that she is not fit for work due to "anxiety states". It is therefore necessary and appropriate for us to seek further medical advice and guidance in relation to Tatsiana's health and contact with her going forward. We therefore need to write to Tatsiana to request her consent to approach her GP for clarification on this point."

64.134 We do not think that this could reasonably be understood to be evidence from which it could be inferred that R3 did not regard the claimant's sickness as genuine but rather was challenging the impact of that sickness when they had a doctors certificate that on the face of it did not preclude direct communication between them and their employee. They had already agreed indefinitely to postpone the disciplinary procedure. For them to have done so is consistent with them accepting that the claimant was experiencing symptoms of illness.

64.135 On 6 April 2018 the claimant was seen by the neurologist who wrote a report (page 1266). The report contains an inaccuracy in that it describes her workplace as having dismissed her. The diagnosis was of migraine with aura and reactive low mood and Citalopram was prescribed. This was not a report that was forwarded to the respondents during employment. The history that was apparently reported to the neurologist is that:

> "In July 2017 she developed abdominal bloating and pain and then ongoing migraine with light sensitivity. Her speech and memory have been affected and she is extremely tearful. Sometime shortly after that her mother developed leukaemia and she returned to Belarus so it has been a very stressful time."

64.136 The neurologist said that she would investigate to see if an underlying reason for the pain and migraine could be identified.

64.137 A letter at page 1381 from the neurologist to the GP of the same day records that the claimant had completed a 100-kilometre pilgrimage. The claimants had reported, "numbness in both hands more on the right

than the left, consistent with carpal tunnel syndrome and similar to symptoms she had during pregnancy which previously settled."

64.138 The investigation summary report was forwarded to the claimant on 28 February 2018 (page 467). The report itself starts at page 808. At this point the business was becoming aware of the potential ramifications of the claimant having chosen to pay her salary in the manner that she did.

> "There are concerns that Tania is administering her pay without paying tax. Tania had financial responsibilities and is aware of the implications for the business. Tania is the only employee paid in this manner. Tania administers this herself and the pay is allocated to friends so that she can claim benefits. The business is unaware of whether Tania is fulfilling her duties to pay tax via self-assessment."

64.139 We are aware that this is an extract from the findings of the investigation and it is not the purpose of this tribunal to make a finding about the reason why the claimant was administering her pay in this way or whether she had aid tax via self-assessment. As we have indicated she declined to answer questions on that point. The interview notes with Tania from the interview on 12 February start at page 810. At the top of page 812 she is asked whether she is paying tax herself in her own assessment and her response is "How is this relevant to investigation?".

64.140 The claimant did not therefore provide information to the investigator to demonstrate that tax had been paid on the sums she had received which would no doubt have been of significant importance to the company in the later communications with HMRC.

64.141 The claimant had moved surgeries in March 2018 (page 1355) . The initial consultation which led to the referral to the neurologist describes the problems as tearfulness with the claimant recounting a sudden onset of tiredness the previous year, a foggy head, migraines for which she had been treated with acupuncture. She was prescribed propranolol which she did not take because she was disinclined to take antidepressants. The fact of the prescription suggests that the GP thought it might help with her symptoms and that they were sufficiently severe to justify medication. The GP notes also indicates that the claimant declined counselling which she explains as being because she was not ready for it ("It was going against by beliefs and my life experience").

64.142 It was suggested to her by the respondent's representative in cross examination that these matters indicated that she did not consider that she needed counselling or medication and therefore that the symptoms could not have been as debilitating as she seeks to indicate. She said that her condition was fluctuating and that she felt more supported because she had the advice of an HR Consultant at this point. This answer does suggest that she found the symptoms manageable.

64.143 We note that she told the GP that she felt that she had gone through a burnout situation but it does seem to us that the visit to the GP was motivated more by the need to have certification for her sickness absence than by the symptoms which she may have been experiencing, but which she did not believe conventional medicine or therapies would alleviate.

64.144 This is not to say that she was not experiencing the tiredness, migraines and "foggy head" that she described as symptoms of stress. She saw Dr Cullen again on 23 April 2018 following a telephone conversation on 13 April where it is recorded (see page 1354) that she has reactive depression which is reviewed on 23 April. It is on this occasion that she declines counselling and said that, "Never took the Propranolol either as went away and felt so much better so feels everything will get easier in time". A four-week review was agreed upon. This is consistent with the depression symptoms being a reaction to what was going on rather than a long-term impairment.

64.145 She saw the GP again on 25 June 2018 when the GP recorded that the claimant looked very well. When this was put to the claimant, she said that the GP had not met her before her disability and was comparing her with the previous visit. We think that, nonetheless, this is a record of a professional noting how a patient presents as part of their observations from which they make a diagnosis and therefore is reliable. It is accurate to say that the GP has not recorded in the June 2018 consultation any ongoing mental or physical symptoms and the claimant had apparently said that she would like an extension of her sicknote. Nonetheless, the GP was apparently satisfied that the anxiety experienced by the claimant justified a certification that she was unfit to work.

64.146 The required proof of ID and payment for the DSAR were received by the respondents on 5 April 2018 (page 518). It is apparent that by that point the claimant was questioning why she received SSP and not company sick pay because R3 on behalf of R4 said that there was no entitlement to company sick pay.

64.147 In the same email R3 asked why the claimant had changed GPs between the initial certificate dated 5 March 2018 and the second dated 23 March 2018. R3 said that he was writing a letter asking for consent to contact the GP to obtain further information and he asked for confirmation of the correct name and address of the new GP practice. The claimant's representative responded the following day (page 515) confirming the correct address of the GP surgery and making a request for information relevant to the claimant's employment and concerning the disciplinary process. A consent form was sent by LP to R3 on 7 May 2018 and the letter (page 1274) requesting medical information about the claimant is dated 24 May 2018. It appears from R3's email of 10 May (page 512) that initially the medical consent form was not signed and

initially LP disputed that what she had sent would not be accepted by the GP. The documentary evidence on this is not entirely clear but the medical notes at page 1353 do record the claimant contacting the surgery about a request for a report from R4 and it being noted that the surgery could not inform R4 directly as there was no consent signed by the patient to discuss her medical affairs with them.

64.148 On 5 September 2018 the GP recorded a consultation where the problems described as stress related and the claimant has apparently indicated that this is related to her employer and that she is feeling as though she is being bullied and feels unable to face R4 face to face and unable to return to work for them. The medical report from the GP (page 1277) is written shortly thereafter.

64.149 The claimant was asked whether she agreed that her GP notes between December 2007 and March 2018 do not document depression and anxiety and she said that was true because she was not visiting a GP or when she had that had not been her complaint “I didn’t know at that time that that was what I was suffering with. I had those symptoms already.”

64.150 We infer from that that in that period prior to March 2018 the claimant herself did not know that she had a mental health condition and her GP had no reason to suspect either.

64.151 By 3 December 2018 the claimant informed her GP that the company that she was pursuing for compensation had gone into liquidation and we accept that she had in mind to make acclaim for compensation and had been supported by an HR Consultant from March 2018.

64.152 In the meantime, legal representatives from R4 had written to LP on behalf of the claimant on 23 July 2018 alleging that the claimant had paid herself sums in excess of her agreed salary and also that she had created falsified invoices to document the manner in which she was paying that salary. They set out a summary of the payments made by R4 to the claimant on her authorisation at page 560 to 561. This was responded to on 16 October 2018 although it is described as having been resent on that date (see page 612). The claimant’s defence that this was a method of payment of her salary that was authorised by the directors was set out in that letter.

64.153 R4 and UK were placed in voluntary liquidation on 28 November 2018 after R3 had instructed independent accountants to carry to a forensic examination of the accounting and payroll records of R4. On 25 October 2018 there was a report sent to JS explaining that the claimant had drawn out approximately £200,000 over a five year period which had not been paid via the payroll system as payments through offshore bank accounts and to third parties who were described as so called contractors. The accountant advised that

> "The amount of PAYE and NIC that would be owed to HMRC if the net amounts drawn were grossed up would be in excess of £200,000 and having regard for interest and penalties I have made provision in the accounts of £250,000."

64.154 We accept R3's evidence (OS paragraph 267) that he was advised that they would need to disclose this to HMRC and that it was possible that they would be able to negotiate a repayment plan or lesser penalties.

64.155 When the claimant was suspended R4 did not pay her the equivalent of £5,000 gross per month because they had identified that the PAYE records showed her to be paid only £675 a month approximately. There was a very small increase by 2018 to £676.44 pcm. It was therefore a challenge for R4 to know how much to pay the claimant. They could either pay her £5,000 a month through PAYE which would be a great increase on what she had received the previous month or continue to pay £676 through PAYE but were unwilling to pay the balance through the unorthodox method adopted by the claimant. We accept that this quandary was the sole reason why the claimant was not paid at the rate of £5,000 per month in Janaury and February 2018 while R4 carried out an investigation into the precise financial circumstances in the company.

64.156 The claimant sought to argue that the amount of the liability would not have been anything like the £250,000 referred to by the new accountant and that the size of the debt to HMRC was overstated. She did not express calculations in her witness statement although it is a long and detailed statement and sought to introduce them during the course of the hearing. We ruled that she should not be able to do so for reasons which were given at the time and are only summarised here; she made the application when her evidence had been concluded; it was not clear that the claimant had expertise to be able to provide those calculations; we considered that it would disadvantage the respondent who had not had notice of potentially complex tax matters that they might need to take advice on before responding to and because admitting the calculations would disrupt the timetable of the hearing and cause delay. If full written reasons are required for this or any other preliminary decision they should be requested within 14 days of the date on which this judgment is sent to the parties. Notwithstanding our decision, in her closing submissions, the claimant effectively sought to argue that there had been a deliberate overstatement of the financial difficulties at the company.

64.157 We reject the argument that it should be inferred from the directors' acceptance of the estimate of the advice about the potential liability for income tax and NICs that they accept that as between R4 and the claimant there was a legal responsibility to pay to the claimant £5,000 pcm take home pay. That was rather a pragmatic acknowledgement that provision needed to be made in the accounts for the likelihood that that is how the HMRC would regard the income tax and National Insurance liability flowing from the conduct of the claimant.

64.158 In any event, the claimant's calculation in her submissions was of what she regarded as a possible worse scenario of £124,000 liability. On any view, there would have been a significant sum potentially due to HMRC once the necessary disclosure was made.

64.159 We find that a substantial sum would have been owing to HMRC as a result of underpayment of income tax and NICs, interest and penalties as a result of the claimant's actions as the financial controller. The respondent, or more specifically R1, R3 and JS, were entitled to accept the advice of professional advisers. This was a family run business that had been developed by R1 and R3 had taken over as CEO. We cannot imagine that they would have put the companies in the group into liquidation willingly unless it was necessary. We accept unreservedly that there was a perfectly genuine judgment that it was necessary for them to put R4 and UK into liquidation as a result of the likely debts owed to HMRC.

64.160 The claimant was made redundant when the company was placed Creditors Voluntary Liquidation. The letter informing her of that is at page 710. It is incorrectly dated 26 November, but it is now common ground that the claimant received that letter on 29 November and that was the date on which her employment ended.

<u>Was there a relevant transfer to R5?</u>

64.161 The claimant was made redundant with effect on 29 November 2018. The other members of staff were employed by UK which went into liquidation because of the licence agreement and financial connections between the two companies. The other members of staff were therefore also made redundant.

64.162 JS had registered R5 in June 2018 and he was appointed Director. Initially, R3 was also a director but he resigned almost immediately, and we accept that this was because R3 and JS were advised that there could be an issue in having a director of an insolvent company as a director of R5. R5 opened a bank account but we accept JS's evidence that it did not trade immediately. In October 2018 R3 agreed that R4 would offer R5 the licence to sell £25,000 worth of stock under a brand previously used by R4. The bank account statements show that R5 traded as "Ben's Natural Health". Page 966 of the bank statement shows that R5 started to trade on 18 October 2018. Advice that the companies needed to be put into Creditors Voluntary Liquidation was made no later than 15 October 2018 (see page 626) and the email of 17 October at page 625 from the Insolvency Practitioners.

64.163 There is an asset sale agreement dated 30 November 2018 at page 996 under the auspices of the liquidator by which R5 agreed to purchase office furniture, stock and goodwill as set out in clause 2.1 at page 1000.

The employer payment records of R5 at page 1094 are very detailed. We accept that it is only in December 2018 that trading starts in a meaningful way because that is when employees start to be paid wages. We accept, therefore, that there was no pre-insolvency transfer. The temporary licence to run a test run of sales prior to that date did not involve staff payments. There was no transfer of goodwill or suspension of R4's activities during that period.

64.164 We accept JS' evidence in his paragraph 79 that he decided in December 2018 to hire members of UK staff after R5 acquired the brand. He did not hire one of the customer service agents or the former head of marketing. R5 have produced contracts of employment which are at page 1011 and following showing that the employment started on 1 December 2018.

64.165 JS was the CEO of R5 and carried out the responsibilities for financial management that had been part of the role of the claimant when employed by R4. We accept that his previous experience and his desire with his brother to start a new joint venture meant that as a matter of fact JS would be carrying out the bulk of the role and responsibilities that had previously fallen to the chief financial officer and chief operations officer.

64.166 In addition, JS and R3 reasonably concluded that the claimant had caused R4 and UK to go into liquidation. At the very least, even if one accepts that she genuinely believed that she was following a practice that was appropriate, her actions in managing her own salary and in responding to questions about it betrayed a complete ignorance of the possible effect of underpayment of tax on the financial affairs of the company that employed her. This on its own provides and provided JS with a complete and non-discriminatory reason not to recruit the claimant.

Conclusions

65. We now set out our conclusion on the issues applying the law as set out above to the facts that we have found. We do not repeat all of the facts here so that would add unnecessarily to the length the judgment, but we have them all in mind reaching those conclusions.

Time

65.1 We will deal with the question of whether any claims are out of time after our conclusions on the issues.

Who was or were the claimant's employer? (LOI Paragraph 5.2)

65.2 Who was the claimant's employer? There is no documentary evidence that the claimant's employer was any entity other than R4 or Afterthought. There is no documentary evidence consistent with her having been

employed by any other entity at the same time as she was employed by Afterthought. The payslips suggest that she was employed by Afterthought immediately before her employment with R4 started. We have concluded that she was employed by Afterthought from 1 Janaury 2013 when it appears to have been agreed by the parties that she would go on the payroll and the greater formality of their relationship leads to the inference that she became an employee.

65.3 The evidence suggests that Afterthought continued in existence for a number of years after the claimant started working for R4 and was eventually dissolved on 18 December 2018. R4 was trading for some time before UK started operating and the evidence suggests a continuity of business operations from Afterthought to R4. Although there was evidence that UK was brought into existence so that domestic activities and income could go through a different company to worldwide income, the gap in time between R4 starting to trade and UK starting to trade causes us to think that the move of employment from Afterthought to R4 should be viewed separately to that restructure. In the light of our findings about the business carried out by Afterthought and immediately carried out by R4, we accept that the claimant's employment was transferred from Afterthought to R4 and there was a relevant transfer within TUPE. This means that the claimant was continuously employed from 1 January 2013. We find that she was not an employee employed under a contract of employment prior to that date.

<u>Who was the claimant's employer in 2018? Was there at any relevant time a transfer to the 5th respondent?</u>

65.4 R4 entered liquidation on 28 November 2018. All of the employees who were hired by R5 had not been employees of R4 but of UK. Although R5 had been incorporated on 18 June 2018 the limited amount of trade that it carried out in October and November 2018 was the sale of a limited amount of stock under a time limited licence from R4 as a test run. The continuous employment of employees by R5 started on 1 December 2018. The asset agreement by which R5 purchased assets from R4 and UK took place on 30 November 2018.

65.5 We do not consider that this falls within the definition of a relevant transfer in regulation 3(1). We do not consider that this can be said to amount to the transfer of an economic entity which retains its identity. Furthermore, we do not think that there was an organised grouping of employees carrying out activities which were to be carried out by R5.

65.6 In any event, as Mr Hodson points out in paragraph 44 of his opening note, regulation 8 applies if at the time of any relevant transfer the transferor (which for the purposes of the claimant's argument is R4) is subject to insolvency proceedings. It seems to us that regulation 8(7) clearly applies in the circumstances of this case which excludes the operation of

regulations 4 and 7 TUPE where the transferor is the subject of insolvency proceedings such as the Creditors Voluntary Liquidation. Therefore, if – contrary to our conclusion - there was a relevant transfer or an undertaking from R4 to R5, the termination of her contract of employment on 29 November 2018 was still effective and her employment did not transfer to R5.

Unfair dismissal

65.7 We are quite satisfied that the reason for the dismissal was redundancy and that that was a genuine reason. Independent accountants and auditors had been instructed and had advised that both R4 and UK were insolvent and that the responsible thing for the director to do was to enter into a CVL which was overseen by liquidators who were licenced insolvency practitioners. In doing so, a business that had been run in one form or another by the family for 15 years was broken apart and it is not credible that this was done for any other reason than that it was genuinely believed to be necessary. At the time there were extant disciplinary proceedings pending against the claimant which the directors had reasonable grounds to pursue. Had there not been a genuine insolvency situation it would have been far simpler to proceed with those. The appointment of an independent disciplinary investigator demonstrated that R3 was willing for the companies to spend money to ensure an independent consideration of the disciplinary allegations.

65.8 The claimant's allegation that the extent of the potential liability to HMRC had been overstated only goes to the amount of that still considerable potential liability. We consider that any organisation could reasonably expect its chief finance officer to ensure that it was being run in a way that avoided sizeable liability to the tax authorities including penalties and interest. Whether this potential liability was £125,000 or £250,000 does not seem to us to be a valid basis for suggesting that the insolvency was not genuine – based upon what we have been told about the financial affairs. Above all, the directors were entitled to take the professional advice that they were given.

65.9 R4 is not represented before us and has not taken a part in these proceedings. It is argued that the redundancy dismissal would be unfair through lack of consultation. It is true that there was no consultation. However, we consider that consultation in these circumstances was utterly futile and that this was one of those rare occasions when a combination of insolvency of the employer and the responsibility of the employee for the causes of that insolvency mean that it can be confidently stated that consultation was futile. R4 could not avoid insolvency and no alternative jobs were available which it would have been reasonable to offer to the claimant. We have therefore concluded that the dismissal was not unfair.

65.10 The statement of affairs of R3 as at 21 November 2018 at page 700 shows a deficiency as regard unsecured creditors of £104,318. The estimated deficiency for UK was £66,976, page 698. UK was unable to continue because its main revenue stream was from the management charge to R4.

Equality Act s.13 Direct sex discrimination

65.11 The claimant accuses R3 of not taking her sickness seriously by the way in which he responded to her solicitors in about March 2018. This refers to an exchange of correspondence at page 484 where he asks for direct contact to be maintained with the claimant and to a request over the next few months for a report from the claimant's GP as well as the requested explanation for the change of GP.

65.12 We do not think that this allegation was made out. We do not consider that these matters lead to the inference that R3 was disregarding the claimant's sickness was not taking it seriously or did not regard it as genuine. R4 by R3 postponed the disciplinary meeting and that demonstrates that they took her ill health seriously. They did, as requested, communicate with LP despite the perfectly reasonable stance of R3 that it was important that they should be able to communicate directly with their employee. On the balance of probabilities, this alleged act did not happen.

65.13 The claimant complains that she was not paid her full pay during sickness absence. However, she did not have a contractual entitlement to full pay. She was paid in accordance with the terms in the handbook and was paid Statutory Sick Pay. She did not provide evidence from which we think it was proper to conclude that it was custom and practice and therefore a contractual entitlement to company sick pay. She had been paid full pay during a short period of sickness absence in July 2017 which was only anticipated to be short. Her letter to her employer notifying them that she was certified unfit for work included her expectation that she would thereafter be paid Statutory Sick Pay. Therefore, although R3 on behalf of R4 did cause R4 to pay her SSP rather than full pay, the entire reason was that that was her contractual entitlement and the discretion not to pay her company sick pay was not exercised in her favour. That was nothing to do with her sex. We reject the allegation that this was direct sex discrimination because there is nothing from which to infer that the claimant was treated les favourably than any other employee in like circumstances would have been.

65.14 It is alleged that the claimant was subjected to direct sex discrimination by not transferring her from R4 to R5. We have found that there was no relevant transfer within the meaning of TUPE. R4 had no other employees. The employees of UK were not automatically transferred to R5. We have seen their contracts of employment and their continuous

employment started on 1 December 2018. She was therefore not treated differently to the other employees of the business.

65.15 If one interprets this allegation as being an allegation that R5 did not hire her and that this was sex discrimination, then we have concluded that the reasons why R5 did not hire the claimant and did not approach her to ask her if she wished to work for them had nothing to do with sex. There were three very good reasons not to hire the claimant: JS was doing the job that she had previously done and there was no need for a separate Chief Finance Officer; JS had reasonable grounds for believing that the claimant had caused the liquidation of R4 because of the way in which she had caused R4 to pay her salary and because she had not told the accountant the full amount of her income for PAYE purposes and, finally, his experience of working alongside the claimant caused him reasonably to believe and genuinely to believe that she had not been carrying out her role as the Chief Finance Officer in a competent fashion. These are three good and non-discriminatory reasons why he should not approach her and ask her if she wished to apply to be employed by R5.

65.16 The claimant was dismissed by reason of redundancy and we are quite satisfied that that was the genuine and whole reason for the dismissal. All of the employees of UK (the other employees of the business) were also made redundant. There is nothing from which to infer that she was treated less favourably than a man would have been or that this was anything to do with her sex.

65.17 Even if we are wrong about the fairness of the decision to dismiss the claimant, for reasons that we have already explained dismissal for redundancy was a certainty with no prospect of retaining employment in a comparable role. The same is true in relation to any losses that the claimant says flows from her loss of employment.

65.18 For the reasons we have explained in so far as the matter set out in issue 4.8 have been shown to have occurred, we are quite satisfied that they do not amount to less favourable treatment on grounds of sex.

Discrimination for a reason arising from disability

65.19 We have concluded that the claimant was not disabled by reason of anxiety, mental health issues and/or PTSD during the period relevant for the disability discrimination claim which is March 2018 to December 2018. There is no medical evidence that she was suffering from mental health problems prior to March 2018 when she consulted her GP in order to obtain a sickness certificate. The description in the GP's records of reactive depression in April 2018 suggests that the symptoms of stress and depression were a reaction to the circumstances that she was then in, namely that she had just received the investigation report which

indicated that the respondents had discovered that she had not been causing R4 to make disclosure though PAYE of her full salary.

65.20 There is evidence that she had been suffering from migraines in August and September 2017 when she was referred for acupuncture treatment. However, the way the claimant presented her condition as reported in the GP's records suggests that she did not consider herself to have a mental impairment at that time. We are also quite satisfied there was nothing in the way that she presented herself to R3 in their conversations through July, August and September 2017 that would cause him to think that there was a long-term condition.

65.21 We do not consider that the impact that the claimant has made out as being that experienced at the time was continuous until March 2018 by 29 November 2018 even if the impact on her of the reactive depression could amount to an adverse impact on her ability to carry out day to day activities in terms of its effect on her sleep, her cognitive ability, her ability to communicate, then it did not amount to long-term and could still be considered to be a reaction to the events that were unfolding. We conclude that the claimant did not have significant adverse effects upon her ability to carry out day to day activities that had continued prior to March 2018. She derived benefit from a week off in July 2017 and from the retreat in August 2017 and we reject her account that she was in fact continuously suffering from the effects she describes at that point. She derived benefit from acupuncture, and we find that even the headaches did not happen continuously such that they could be regarded as a more than trivial impact upon her ability to carry out day to day activities. Her consultation with the GP in March 2018 appears to have been motivated by a desire to be certified unfit for work when disciplinary proceedings have commenced. Any impact from March 2018 onwards would not have been long-term by her dismissal on 29 November 2018. There is no contemporaneous evidence from which to infer that it could well continue for 12 months from March 2018.

65.22 Further, the respondent has shown that they did not and could not reasonably have known of any long-term mental health condition. She did not present as someone who was unwell either in meetings they had with her between July and October 2017 or at the Christmas party in early December 2017. That is consistent with the way the GPs record her appearance and presentation in meetings through March and April 2018. The respondent received sickness certificates from March onwards indicating she was unfit for work due to anxiety but neither this nor their previous knowledge of her was sufficient to fix them with any knowledge that there was a condition that was long-term within the meaning of the EQA.

65.23 Therefore, the allegations of discrimination arising from disability fail because the claimant has not shown herself to be disabled at the relevant

period. Alternatively, they fail because the respondents have shown that they did not have actual or constructive knowledge of any disability.

65.24 In any event, the particular acts complained of as set out in paragraph 4.11 of the list of issues do not make sense as allegations of unfavourable treatment contrary to s.15 EQA. It is suggested that the respondent's reasons for those actions were her sickness absence. We have already set out above our conclusions that in fact R3 and R4 did not disregard the claimant's sickness as genuine. We have also set out our conclusions that there were non-discriminatory reasons that fully explain the other matters complained of in paragraphs 4.11.2 to 4.11.4.

65.25 Even had we concluded that the claimant was disabled and that the respondent had actual or constructive knowledge of it, the claims would fail because the claimant has not shown that there was unfavourable treatment for a reason arising in consequence of her disability. We do not need to go on to consider whether the respondent had a legitimate aim for the actions.

<u>Unauthorised deduction from wages January to March 2018</u>

65.26 This is a claim made against R4 only and is made on the basis that the claimant was not paid her full pay of £5,000 gross per calendar month between Janaury and March 2018. The transfers that the claimant authorised are set out at page 560. Her schedule of loss is at page 1482. The claimant was not entitled to receive anything more than Statutory Sick Pay from 1 March 2018 onwards since she was unfit for work and was not contractually entitled to more than that. So far as we can tell she was paid SSP at the appropriate rate and therefore there was no unauthorised deduction from wages from the March payroll onwards.

65.27 As a claim under s.23 of the Employment Rights Act 1993 therefore the complaint was presented more than three months after the last deduction and it was plainly reasonably practicable for the claimant to present it sooner. She had the benefit of the advice from LP. However, it was also brought as a breach of contract claim which needed to be presented within three months of the effective date of termination and the claim under the Extension of Jurisdiction Order is therefore in time.

65.28 We accept that under the contract the claimant was entitled to be paid £5,000 gross per calendar month, subject to the usual statutory deductions. However, prior to this period R4 paid the claimant without making deduction for tax and National Insurance and therefor the claimant was overpaid. In those circumstances the claimant has not shown that there was a breach of contract by paying her £676 per month in January and February 2018 when she had been overpaid by being given the tax and National Insurance that should have been transferred to HMRC and

R4 was going to have to account to HMRC for that. This part of the breach of contract claim fails.

Notice Pay

65.29 We have concluded that the claimant's continuous employment started on 1 January 2013 and, therefore, on dismissal for redundancy she was entitled to be paid the statutory minimum of five weeks' notice. Alternatively, she should have been paid 5 weeks' pay in lieu of notice at the rate of £5,000 per calendar month subject to deductions in respect of tax and National Insurance.

65.30 It is clear from pages 560 to 561 that the claimant as Chief Finance Officer (in the director's and employer's ignorance) transferred to herself £4,325 per month from an offshore bank account which together with £675 per calendar month from the Nat West bank account totalled £5,000. The £675 was declared for PAYE as is demonstrated by the payslips. The claimant had declined to tell us whether she declared the rest of her income to the UK tax authorities in order that she should account for the tax and National Insurance owing on it. R3 told us that the claimant had intimated to him that she was not declaring her whole income for the purposes of the benefits claim.

65.31 It appears that the Insolvency Service may have accepted the payslips and P60 evidence of the claimant's salary and paid her in respect of notice pay based upon that. Within these proceedings, she has declared a sum of £2,903.63 compensation for loss of office (page 1483) as having been received from the Insolvency Service to which needed to be added a later payment of £58.47 (see page 1754). Credit needs to be given for the notice pay proportion of these sums.

65.32 In order to calculate the appropriate net rate of pay we have taken a gross pay of £5,000 per calendar month, the claimant's tax code of 1100L at the relevant period of time and used an online income tax and National Insurance calculation tool. This gives a take home pay of £42,864.76 per annum. Five weeks' notice pay at that annual rate would be £4,121.61. The claimant has been paid by the Insolvency Service the sum of £352.10 in respect of notice pay meaning there is a shortfall of £3,769.51 net. This is a shortfall of the notice pay that she is due to be paid following her redundancy by R4.

65.33 The claimant has not claimed in respect of a redundancy payment and we have decided that she was not unfairly dismissed and therefore do not award a basic award.

Holiday pay

65.34 The company handbook at page 84 does not specify the start of the holiday year and it would therefore be the anniversary of the claimant's start date, namely 1 January. In the final year of her employment, 2018, the claimant was employed between 1 January and 29 November 2018 and, so far as we have been told, did not take any annual leave during that period. This amount to 11 months during which she would have accrued 25.66 days' paid leave. This is approximately 5 weeks holiday which was accrued but not taken on termination of employment which, multiplied by the weekly net rate, means she is due to be paid £4,230.41.

65.35 The other sums referred to in issue 4.2.1 are for the cost of medical insurance and we have concluded that that was not a contractual entitlement.

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Employment Judge George

Date: …10 May 2022 ………………..

Sent to the parties on: 11 May 2022

For the Tribunal Office